UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECLARATION

Civil Action No.: _____

In Re Subpoena and Deposition Notice to
DAVID THOMAS

(Underlying Action Pending in the United States District Court for the District of Arizona, Civil Action No.: 2:17-cv-03195-JJT)
and
(Underlying Action Pending in the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ

WILLIAM G. BAUER, ESQ., declares as follows:

1. I am an attorney duly licensed to practice before this court and am a Partner with Woods Oviatt Gilman LLP, attorneys for the Movant and Non-Party David Thomas ("Mr. Thomas").

2. This Declaration is submitted in support of Mr. Thomas' Motion for an expedited hearing, and a stay of Mr. Thomas' compliance with Subpoenas to testify at a deposition in two civil actions pending a hearing on his Motion to Quash the aforesaid Subpoenas.

3. Mr. Thomas was served on approximately November 13 or 14, 2018 with Subpoenas seeking his testimony and compelling his appearance for depositions relating to actions pending in the District of Arizona bearing Civil Action No.: 2:17-cv-03195-JJT and Northern District of Illinois bearing Civil Action No.: 16-cv-07548 PRG-IDJ. Complete, true and accurate copies of the subpoenas served is annexed as **Exhibit "A"**.

4. The Subpoenas at issue provide for Mr. Thomas, a resident of Grand Island, New York, to be deposed in Rochester, New York on December 20, 2018. Given the short period of time to otherwise act, Mr. Thomas seeks an expedited hearing to address the merits of the

Motion to Quash the Subpoenas so as to avoid putting Mr. Thomas through unnecessary depositions which are unduly burdensome, duplicative, and seek information that is not relevant or material to the pending cases.

5. Since Mr. Thomas ceased working years prior to events in the Arizona and Illinois actions, he certainly has no knowledge of the incidents nor could he possibly have any knowledge or information concerning the products at issue since they were not manufactured by his prior employer.

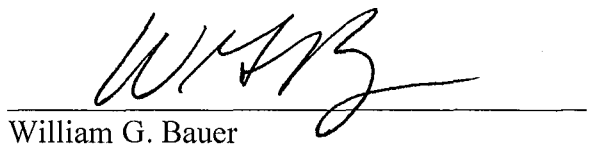
6. The accompanying motion to quash more fully establishes the basis to grant the movant's Motion to Quash the Non-Party Subpoenas. A copy of the Motion to Quash is attached as **Exhibit "B"**.

7. An expedited hearing is sought since under the ordinary return time on Mr. Thomas' Motion to Quash would be beyond the date scheduled for Mr. Thomas' compliance.

WHEREFORE, it is respectfully requested that the Court grant David Thomas' motion for an Expedited Hearing and issue an Order staying Mr. Thomas from complying with the subpoena issued by the Plaintiff's counsel until a hearing can be conducted on the Motion to Quash and permanently quashing the Subpoenas issued by Plaintiff upon Mr. Thomas, together with such other and further relief as this Court may deem just and proper.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: December 6, 2018



William G. Bauer

EXHIBIT A

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

Kurtis M. Bailey
Plaintiff
v.
Worthington Industries Incorporated, et al.
Defendant

Civil Action No. 16-cv-07548 PRG-IDJ

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: DAVID THOMAS

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Problems and defects with Bernzomatic/Worthington/Western/Chilton NRT fuel cylinders and torches, including failures, defects, injuries, damage, and matters pertaining to the design of the torch fracture groove.

Place:	Date and Time:
Alliance Court Reporting, Inc. 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920)	12/20/2018 10:00 am

The deposition will be recorded by this method: stenographically by court reporter, and by video.

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/07/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Kurtis M. Bailey, who issues or requests this subpoena, are:

Andrew W. Shalaby, 7525 Leviston Avenue, El Cerrito, CA 94530 Tel. 510-551-8500

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 16-cv-07548 PRG-IDJ

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named individual as follows: Mr. John M. Nelson

355 UPPER VALLEY ROAD, ROCHESTER, NY 14624

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

David Wei Chen sbn 184071
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Oakland, CA 94612-1427
Tel. 510-575-0851
Fax: 510-201-1577
Cell: 510-640-7251
email: david.chen@davidwchenlaw.com

Andrew W. Shalaby sbn 206841
7525 Leviston Ave
El Cerrito, CA 94530
Tel. 510-551-8500
Fax: 510-725-4950
email: andrew@eastbaylaw.com

Attorneys for Plaintiff
Kurtis M. Bailey

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Kurtis M. Bailey, Plaintiff, vs. Worthington Cylinder Corporation, et al., Defendants.	Case No. 16-cv-07548 PRG-IDJ INSTRUCTIONS TO MR. DAVID THOMAS FOR APPEARANCE AND PRODUCTION OF DOCUMENTS AT DEPOSITION Deposition date: 12/20/18 Time: 10:00 a.m. Location: Alliance Court Reporting 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920) Hon. Philip G. Reinhard

TO MR. DAVID THOMAS:

You have been served with a subpoena to testify at a deposition in a civil action. You are respectfully requested to bring with you the following:

> Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

Please find enclosed herewith a check for witness fees and mileage in the amount of $87.15.

Upon receipt of the subpoena please call Plaintiff's counsel's office, East Bay Law, at 510-551-8500, and advise as to the estimated number of documents and nature of products and/or materials you may bring to the deposition so that arrangements can be made to facilitate copying and photography.

Dated: November 7, 2018

Andrew W. Shalaby,
Attorney for Plaintiff Kurtis M. Bailey

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Arizona

Jason Lou Peralta
Plaintiff
v.
Worthington Industries Incorporated, et al.
Defendant

Civil Action No. 2:17-cv-03195-JJT

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: DAVID THOMAS

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Problems and defects with Bernzomatic/Worthington/Western/Chilton NRT fuel cylinders and torches, including failures, defects, injuries, damage, and matters pertaining to the design of the torch fracture groove.

Place:	Date and Time:
Alliance Court Reporting, Inc. 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920)	12/20/2018 10:00 am

The deposition will be recorded by this method: stenographically by court reporter, and by video.

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/05/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Jason Lou Peralta, who issues or requests this subpoena, are:

David W. Chen, 1300 Clay Street, Suite 600, Oakland, CA 94612 Tel. 510-551-8500, 510-575-0851

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:17-cv-03195-JJT

PROOF OF SERVICE

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I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named individual as follows: Mr. John M. Nelson

355 UPPER VALLEY ROAD, ROCHESTER, NY 14624

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

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(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

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(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

Andrew W. Shalaby sbn 206841
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El Cerrito, CA 94530
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Oakland, CA 94612-1427
Tel. 510-575-0851
Fax: 510-201-1577
Cell: 510-640-7251
email: david.chen@davidwchenlaw.com

Attorneys for Plaintiff
Jason Lou Peralta

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jason Lou Peralta, Plaintiff, vs. Worthington Industries, Inc.; Worthington Cylinder Corporation; Worthington Cylinder Wisconsin, LLC; BernzOmatic Company; Defendants.	Case Number: 2:17-cv-03195-JJT INSTRUCTIONS TO MR.DAVID THOMAS FOR APPEARANCE AND PRODUCTION OF DOCUMENTS AT DEPOSITION Deposition date: 12/20/18 Time: 10:00 a.m. Location: Alliance Court Reporting 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920) Judge: Hon. John J. Tuchi

TO MR. DAVID THOMAS:

You have been served with a subpoena to testify at a deposition in a civil action. You are respectfully requested to bring with you the following:

> Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

Please find enclosed herewith a check for witness fees and mileage in the amount of $87.15.

Upon receipt of the subpoena please call Plaintiff's counsel's office, East Bay Law, at 510-551-8500, and advise as to the estimated number of documents and nature of products and/or materials you may bring to the deposition so that arrangements can be made to facilitate copying and photography.

Dated: November 7, 2018

David W. Chen, Attorney for Plaintiff
Jason Lou Peralta

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NOTICE OF MOTION TO QUASH

In Re Subpoena and Deposition Notice to
DAVID THOMAS

Civil Action No.: _____
(Underlying Action Pending in the United States District Court for the District of Arizona, Civil Action No.: 2:17-cv-03195-JJT)

And

(Underlying Action Pending in the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ

PLEASE TAKE NOTICE, that upon the annexed Declaration of William G. Bauer, Esq. dated December 5, 2018 with Exhibit "A" through "F" attached thereto, Non-Party, David Thomas will move this Court on a date and time to be determined by the Court for an Order pursuant to Fed. R. Civ. Proc. 45 (d)(3), quashing the subpoena served upon him relating to an actions pending in the United States District Court for District of Arizona and United States District Court for the Northern District of Illinois, together with such other and further relief as this Court may deem just and proper.

DATED: December 5, 2018

WOODS OVIATT GILMAN LLP

By: _____

William G. Bauer, Esq.
Attorneys for Movant, David Thomas
700 Crossroads Building
2 State Street
Rochester, New York 14614
585.987.2800
wbauer@woodsoviatt.com

TO: Andrew W. Shalaby, Esq.
7525 Leviston Avenue
El Cerrito, CA 94530
510.551.8500
Andrew@eastbaylaw.com

Attorneys for Plaintiffs, Jason Lou Peralta and Kurtis M. Bailey

WHITHAM LAW OFFICE
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Co-Counsel for Plaintiff, Kurtis M. Bailey

David Chen, Esq.
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Oakland, CA 94612
510.575.0851
David.chen@davidwchenlaw.com

Co-Counsel for Plaintiff, Jason Lou Peralta

BOWLES & VERNA LLP
Richard A. Erog, Esq.
Jason J. Granskog, Esq.
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Walnut Creek, CA 94596
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GOLDBERG SEGALLA LLP
James W. Ozog, Esq.
311 S. Wacker Drive, Suite 2450
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Attorneys for Defendants, Worthington Cylinder Corporation and Worthington Industries, Inc.

JONES, SKELTON & HOCHULI, P.L.C.
James J. Osborne, Esq.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
602.263.1700
josborne@jshfirm.com

Attorneys for Defendants,
Worthington Industries, Inc.,
Worthington Cylinder Corporation and
Worthington Cylinder Wisconsin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECLARATION IN SUPPORT OF MOTION TO QUASH

In Re Subpoena and Deposition Notice to DAVID THOMAS

Civil Action No.: _____

(Underlying Action Pending in the United States District Court for the District of Arizona, Civil Action No.: 2:17-cv-03195-JJT)
and
(Underlying Action Pending in the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ

I, WILLIAM G. BAUER, ESQ., declare as follows:

1. I am an attorney at law duly admitted to practice before this Court. I am a Partner at Woods Oviatt Gilman LLP, counsel of record for Non-Party, David Thomas ("Mr. Thomas"). I submit this declaration in support of Mr. Thomas' attached Motion to Quash.

2. Attached hereto as **Exhibit A** is a true and correct copy of the Complaints in *Peralta v. Worthington Inds. Inc.* and *Bailey v. Worthington Inds. Inc.*

3. Upon inquiry to counsel for Defendant Worthington in the Underlying Actions, I confirmed that the torches and cylinders at issue were manufactured by Worthington at its manufacturing facility in Wisconsin. The products at issue in *Peralta v. Worthington Inds. Inc., et al.* are a torch manufactured in 2015 and a propane cylinder manufactured in 2014 with a date of loss of February 5, 2016. The products at issue in *Bailey v. Worthington Inds. Inc., et al.* was a torch manufactured in 2013 and a propane cylinder manufactured in 2013 with a date of loss of May 20, 2014.

4. Attached as **Exhibit B** is a true and correct copy of the Objections to the Thomas Notice of Deposition (Subpoena) filed by Defendant Worthington in the Underlying Actions.

5. Attached as **Exhibit C** is a true and correct copy of the Minute Order entered on November 20, 2018 by Judge Iain Johnston of the Northern District of Illinois in *Bailey v. Worthington Inds. Inc.*

6. Attached hereto as **Exhibit D** is a true and correct copy of an excerpt of Michael Ridley's deposition transcript taken on January 26, 2018 in the Underlying Actions.

7. Attached hereto as **Exhibit E** are true and correct copies of the 2012 Prefiling Order entered in *Shalaby v. Bernzomatic et al.*, No. 11cv68 AJB (POR) (S.D. Ca July 27, 2012) and all subsequent Orders reaffirming the 2012 Orders which are dated January 5, 2018, February 28, 2018, and August 8, 2018.

8. Attached hereto as **Exhibit F** is a true and correct copy of the Declaration of David Thomas signed December 4, 2018 with attached Exhibit A.

DATED: December 5, 2018

By: _____
William G. Bauer, Esq.

EXHIBIT A

Andrew W. Shalaby sbn 206841
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Attorneys for Plaintiff
Jason Peralta

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jason Lou Peralta, Plaintiff, vs. BernzOmatic; Irwin Industrial Tool Company; Newell Rubbermaid Company; Newell Operating Company; Newell Brands, Inc.; Worthington Industries, Inc.; Worthington Cylinder Corporation; Worthington Cylinder Corporation, LLC; Worthington Cylinder Wisconsin, LLC; United States Consumer Product Safety Commission, Defendants.	Case Number: 2:17-cv-03195-JJT FIRST AMENDED COMPLAINT FOR 1. PRODUCTS LIABILITY; 3. INTENTIONAL TORT; 4. DECLARATORY RELIEF (CPSC) Demand for Jury Trial Judge: Hon. John J. Tuchi

I. JURISDICTION

Plaintiff resides in Arizona and Defendant's principle place of business is in Ohio, and the amount in controversy exceeds $75,000, therefore the case falls under diversity jurisdiction per 28 U.S.C § 1332.

The Court has federal question jurisdiction pursuant to 28 U.S.C.A. § 1331 with regard to the declaratory relief claim under 28 U.S.C. § 2201.

II. VENUE

The injury at issue occurred in Mesa, AZ, Maricopa County, therefore this is the proper venue.

III. PARTIES

1. Plaintiff, JASON LOU PERALTA (hereinafter "Plaintiff"), is a competent adult individual, and a resident of Maricopa County, Arizona.

2. Defendant, "BernzOmatic", also known as "the entity formerly known as Bernzomatic, an unincorporated division of Irwin Industrial TooL company and Newell Operating Company." The name "BernzOmatic" has a capital "O" in the original text. The subject products in this action contain the brand name "BernzOmatic". Based on information and belief, Plaintiff alleges that the entity "BernzOmatic" still exists, but exists under the name "Newell Operating Company," and/or under any of Newell's subsidiaries identified below.

3. Irwin Industrial Tool Company is incorporated in Ohio. As of December 18, 2017 the agent and registration information was posted as follows:

> Corporation Service Company
> 50 West Broad Street Suite 1330
> Columbus, OH 43215
> Effective Date: 11/10/2016
> Contact Status: Active

4. Newell Operating Company is incorporated in Delaware. As of December 18, 2017 the agent and registration information was posted as follows:

> Current Entity Name: NEWELL OPERATING COMPANY
> DOS ID #: 318446
> Initial DOS Filing Date: NOVEMBER 23, 1971
> County: DELAWARE
> Jurisdiction: DELAWARE
> Entity Type: FOREIGN BUSINESS CORPORATION
> Current Entity Status: ACTIVE

DOS Process: C/O Corporation Service Company 80 State Street Albany, New York, 12207-2543
Principal Executive Office: Newell Operating Company 6655 Peachtree Dunwoody Road Atlanta, Georgia, 30328
Registered Agent: Corporation Service Company 80 State Street Albany, New York, 12207-2543

5. Newell Brands, Inc. is incorporated in Delaware. As of December 18, 2017 the agent and registration information was posted as follows:

File Number: 2118347 Entity Name: NEWELL BRANDS INC.	Incorporation date: 2/23/1987 Residency: DELAWARE
Registered Agent Information: Corporation Service Company 251 Little Falls Drive Wilmington, DE 19808 Phone: 302-636-5401	

6. Worthington Industries, Inc. is incorporated in Ohio. As of December 18, 2017 the agent and registration information was posted as follows:

Entity Number: 1037038 Business Name: WORTHINGTON INDUSTRIES, INC. Filing Type: CORPORATION FOR PROFIT Status: Active Original Filing Date: 08/24/1998 Location: COLUMBUS County: FRANKLIN State: Ohio	
Agent/Registrant Information: Dale T. Brinkman 200 Old Wilson Bridge Road Columbus,OH 43085 Effective Date: 02/12/2004	

7. Worthington Cylinder Corporation is incorporated in Ohio. As of December 18, 2017 the agent and registration information was posted as follows:

Entity Number: 590252 Business Name: WORTHINGTON CYLINDER CORPORATION Filing Type: CORPORATION FOR PROFIT Status Active: Original Filing Date: 02/26/1982 Expiry Date Location: COLUMBUS County: FRANKLIN State: OHIO
Agent/Registrant Information: Dale T. Brinkman 200 Old Wilson Bridge Road Columbus, OH 43085 Effective Date: 02/12/2004 Contact Status: Active

8. Worthington Cylinder Corporation, LLC is located in Ohio. As of December 18, 2017 the agent and registration information was posted as follows:

Entity Number: 1971002 Business Name: WORTHINGTON CYLINDER CORPORATION, LLC Filing Type: DOMESTIC LIMITED LIABILITY COMPANY Status: Active Original Filing Date: 10/22/2010 Location: COLUMBUS County: FRANKLIN State: OHIO
Dale T. Brinkman 200 Old Wilson Bridge Rd. Columbus, OH 43085 Effective Date: 10/22/2010 Contact Status: Active

9. Worthington Cylinder Wisconsin, LLC is located in Wisconsin. As of December 18, 2017 the agent and registration information was posted as follows:

Entity ID: W047037 Registered Effective Date: 08/17/2004 Status: Registered Status Date: 08/17/2004 Entity Type: Foreign LLC Foreign Organization Date: 08/09/2004 Foreign State OH
Principal Office: 200 OLD WILSON BRIDGE RD COLUMBUS , OH 43085

Registered Agent Office:
C T Corporation System
301 S. Bedford St. Suite 1
Madison , WI 53703

Reference to Defendants: Use of the word "DEFENDANTS" hereinafter shall refer to all of the defendants named in this action except where otherwise stated.

10. United States Consumer Product Safety Commission (CPSC) is named only for the declaratory relief claim set forth below, and shall be referenced as CPSC. Plaintiff's intention in including CPSC is to have the defects of the subject hazardous products determined judicially to be defective so that CPCS may ultimately issue a recall mandate for the subject products to prevent further injuries and deaths to the users of the products of concern. In this regard Plaintiff believes CPCS to be a proper necessary party to the action. There are no damages claims of any kind asserted against CPSC in this action.

IV. RELATIONSHIP OF THE DEFENDANTS

Based on discovery responses and Defendants' various internet postings, Plaintiff alleges the defendants are related as follows:

10. BernzOmatic was an American manufacturing company founded by one Otto Bernz in 1876. The company manufactured handheld torches and accessories, especially gas burner torches using fuel cylinders containing butane, propane, MAPP gas, and oxygen for soldering, brazing, and welding. In the 1940's Otto Bernz Co. relocated to Rochester, New York and changed its name to BernzOmatic. In 1982, BernzOmatic became a division of Newell (now Newell Rubbermaid).

11. Newell Rubbermaid purchased Irwin Industrial Tool Company in the year 2002.

12. Irwin Industrial Tool Company sold the BernzOmatic brand torches and cylinders for a period of time, but Plaintiff is unsure of the time frame. It appears that Irwin Industrial Tool Company sold BernzOmatic brand torches and cylinders from

approximately 2002 to approximately July 2011, when BernzOmatic sold its assets to Worthington Industries, as explained further below.

13. Newell Rubbermaid Company owed Irwin Industrial Tool Company during the relevant years of production, which may include the year of production of the fuel cylinder which caused Mr. Peralta's injuries, or the defective yellow fuel cylinder containing MAPP fuel, owned by Mr. Peralta.

14. Based on information and belief, Plaintiff alleges that BernzOmatic was owned or merged with the entity, Newell Brands Inc. Sometime during or after the year 2011.

15. Worthington Industries, Inc. Manufactured fuel cylinders containing MAPP and Propane Fuel for BernzOmatic from approximately September 2004 to the date it acquired BernzOmatic assets, July 2011.

16. Worthington Cylinder Corporation is an indirect subsidiary of Worthington Industries, Inc. It had acquired certain assets from Western Industries in September 2004. Western Industries had manufactured the BernzOmatic brand fuel cylinders for a period of years up to September 2004, and then Worthington Cylinder Corporation began manufacturing these products from September 2004 onward, for Worthington Industries, as stated in paragraph 6 above.

17. Worthington Cylinder Corporation, LLC appears to be another indirect subsidiary of Worthington Industries. Based on information and belief, Plaintiff alleges on information and belief that it was engaged in the manufacture, marketing, sales and distribution of the subject products at all times relevant herein.

18. Worthington Cylinder Wisconsin, LLC is owned by Worthington Cylinder Corporation, which is owned by Worthington Industries.

19. On page 3 of Worthington Industries' Annual Report 2012, Worthington disclosed its purchase of BernzOmatic assets as follows:

> On July 1, 2011, we purchased substantially all of the net assets (excluding accounts r eceivable) of the BernzOmatic business

> ("Bernz") of Irwin Industrial Tool Company, a subsidiary of Newell Rubbermaid, Inc. Bernz is a leading manufacturer of handheld torches and accessories. The acquired net assets became part of our Pressure Cylinders operating segment upon closing of the transaction.

20. From July 2011 onward Worthington cylinder Wisconsin began manufacturing, marketing, selling and distributing the BernzOmatic-brand torches and fuel cylinders.

21. Due to the complex relationships of the defendant entities, Plaintiff is unable to "flush out" the proper entity or entities to be held accountable for the defects of the subject products, and for his injuries suffered as a result of those defects. Plaintiff therefore informs DEFENDANTS and the Court that if any of the above entities are not proper responsible parties for his injuries, he shall dismiss the non-responsible entities. DEFENDANTS are respectfully requested to resolve amongst themselves the identity of the responsible defendant(s) and advise as to which defendants should be dismissed (if any).

IV. SUBJECT PRODUCTS

22. DEFENDANTS (excluding CPSC) was the manufacturer and marketer of a handheld torch, consisting of three components: (1) a fuel cylinder, (2) an ultra hazardous fuel (Propane or MAPP gas), and (2) a torch handle which mounted onto the cylinder, which was a model TS4000. These components shall jointly be referenced as the "subject torch," referring specifically to the torch products relevant to this action as further described below. At all times relevant herein Plaintiff other fuel cylinders containing MAPP fuel. At a hearing held on December 4, 2017. The Court entered a minute entry (dkt. 32) stating:

> MINUTE ENTRY for proceedings held before Judge John J Tuchi: Oral Argument and Scheduling Conference held on 12/4/2017. Pending Motion argued to the Court. Deadlines discussed and entered. For reasons as stated on the record, IT IS ORDERED granting in part and denying in part [9] Defendants' Motion to Strike Portions of Complaint and Motion to Dismiss Complaint in Part for Failure to State a Claim. Scheduling Order to follow.

APPEARANCES: Andrew Shalaby for Plaintiff. Jason Granskog for Defendants. (Court Reporter Elaine Cropper.) Hearing held 2:32 PM to 3:28 PM. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (JAMA)

At said hearing, the Court stated that the fuel cylinders that contain MAPP fuel are to be excluded from the scope of this action. Therefore, on this First Amended Complaint, the fuel containers that contain MAPP fuel are excluded by Court order, and preserved in the record as a product Plaintiff has moved the Court to include within the scope of this action.

NON-COMPLIANCE WITH 49 CFR 178 et seq.

23. The subject fuel cylinders, ultra hazardous fuel, and torch tips, including their packaging, warning labels and disclosures, must comply with the requirements of 49 CFR section 178 et seq., also known as "DOT 39" requirements, imposed by the United States Federal Government. Based on information and belief, Plaintiff alleges that the above-described products fail to comply with 49 CFR 178 et seq. in several regards, including but not limited to the following:

(A) The subject cylinders must contain brazed seams which are assembled to proper fit to ensure "complete penetration of the brazing material throughout" all "brazed joins." The subject cylinders do not comply with this requirement.

(B) The subject cylinders must contain brazed seams which have "design strength equal to or greater than 1.5 times the maximum strength of the shell wall."The subject cylinders do not comply with this requirement.

(C) The subject cylinders must contain "welded seams which are properly aligned and welded by a method that provides clean, uniform joins with adequate penetration." The subject cylinders do not comply with this requirement.

(D) The subject cylinders contain material used for welded openings and attachments which are of "weldable quality and compatibility with material of the cylinder." The subject cylinders do not comply with this requirement.

(E) When "one cylinder taken from the beginning of each lot, and one from each 1,000 or less successively produced within the lot thereafter" is "hydrostatically tested to destruction" as mandated, the entire lot is rejected if ever a "failure initiates in a braze or a weld or the heat affected zone thereof. The subject cylinders do not comply with this requirement.

(F) When the test done above results in a failure occurring in any opening, reinforcement, or at a point of attachment, the entire lot is rejected and discarded. The subject cylinders do not comply with this requirement.

(G) The subject cylinders must otherwise comply with all "Dot 39" requirements and thus meet minimum required governmental safety requirements. The subject cylinders do not comply with this requirement.

24. Plaintiff suffered severe burn injuries on February 5, 2016, when the cylinder he was using had breached and failed. The breach of cylinder was the result of the failure of his cylinder, and generally, the subject cylinders, to comply with the requirements of 49 CFR § 178. The cylinder owned by the plaintiff was weak and substandard, causing the fuel cylinder to fail and breach upon contact of the tip of the torch with a solid object, while the fuel emission lock of the TS4000 was engaged. This resulted in a catastrophic failure which has caused severe burn injuries to the plaintiff in this action.

25. Had the TS4000 torch's safety fracture groove feature operated as intended, the cylinder would hot have breached and failed, causing Plaintiff's injuries.

26. Alternatively, had the cylinder not been too weak and substandard, it would not have failed at a measure of force which was too low to activate the TS4000's fracture groove feature, causing Plaintiff's injuries. Furthermore, the failure in this instance preceded the dropping of the torch assembly because the center bushing area of the cylinder breached without any application of force at all, causing flame to emit from the area, and causing Plaintiff to drop the assembly onto the tip of

the torch (as they are top-heavy). The failure of the fracture groove feature to fracture, and the breach of the cylinder instead, were secondary defects that lead to the catastrophic fuel discharge.

27. Plaintiff alleges that the subject fuel cylinders have failed and caused severe burn injuries and deaths throughout the United States and in other countries.

28. Plaintiff discloses that the United States Federal Court's docket system has posted many litigations filed throughout the United States alleging severe burn injuries to have been caused by the subject fuel containers, some containing propane fuel, and others containing MAPP fuel.

MULTIDISTRICT LITIGATION COORDINATION MOTION PENDING

29. Plaintiff discloses that the United States Panel on Multidistrict Litigation has pending before it at this time a motion to coordinate or consolidate six federal court cases which are presently pending in different states alleging failure of the subject fuel containers, MDL No. 2823.

FIRST CAUSE OF ACTION FOR NEGLIGENCE (PRODUCTS LIABILITY)

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a FIRST cause of action, on information and belief, as follows:

30. The subject fuel cylinders, including the fuel cylinder which failed and severely injured the plaintiff, contain both design and manufacturing defects at the uppermost portion of the cylinders. The defects include but are not limited to an improper and substandard connection between the narrow thread assembly located at the top of the cylinder and the horizontal surface of the cylinder to which it attached, a defective design with a pressure relief valve that causes it to sometimes fail and lead to a catastrophic explosion of the cylinder, and poor quality of products and materials which sometimes lead to the production of cylinders which are incapable of withstanding the amount of force they were designed to withstand before breach. The

most frequent and prevalent failures occur between the welded joints of the narrow thread assembly and the horizontal surface of the cylinder. There have been many such failures throughout the country and worldwide with these products.

31. The defects with the subject torch heads, including the torch head used by the plaintiff at the time of injury in this case, exist on the safety feature known as the "fracture groove" of the torch heads. The application of force to the tip of the torches was deemed a foreseeable event by DEFENDANTS (excluding CPSC), and prompted the design and implementation of the fracture groove features in the torch heads.

32. BernzOmatic had posted the following description of the defect of the subject cylinders, and the intended function of the TS4000 torch tip's safety feature, the fracture groove:

> http://www.bernzomatic.com/resources/glossary.aspx, as of 12/09):
>
> Fracture Groove: A designed in failure point in the torch, so that when the torch & cylinder are dropped, the fracture groove will fail prior to the cylinder center bushing failing. If the center bushing fails, then an extremely large 8 to 10 foot flame will erupt from the cylinder.

The "center bushing" is the narrow neck portion on the top of the fuel cylinder, which is the area where Plaintiff's cylinder had failed, causing his injuries.

33. In every known incident of failure of the fuel cylinders upon the application of pressure to the subject torch tips, the safety fracture groove feature had failed to fracture and prevent the catastrophic failures of these fuel cylinders.

34. DEFENDANTS (excluding CPSC) have been aware of the existence of the above-described defects for more than a decade, and likely for more than three decades, but have **never recalled** these products.

35. DEFENDANTS (excluding CPSC) have been aware of the existence of the above-described defects for more than a decade, and likely for more than three decades, but have **never warned** the users of these products.

36. Approximately in the year 2008 a website was posted by a victim of injuries caused by these defective products. The website is posted at:

www.bernzomaticinjuries.com

The posting was to bring to Defendants' attention these defects, and to warn the users of the product.

37. In the year 2008, by way of misrepresentation to a web hosting service, BernzOmatic had the above website taken down.

38. The misrepresentation was in that BernzOmatic told the hosting company of the website that it was owner of the domain, which was false. The domain was owned by the injury victim.

39. Defendant's intent in wrongfully taking down the website was to prevent potential purchasers and users of the subject products from learning about their hazards and dangers as described herein above.

40. The holder of the domain was successful in putting the website back up, only to be met with a complaint filed on November 21, 2008 by BernzOmatic, which was filed with the "World Intellectual Property Organization Arbitration and Mediation Center" in Switzerland, in an effort to remove the website so that the public would not be made aware of these defects.

41. BernzOmatic's domain dispute was not successful, and further, establishes the actual knowledge and awareness of Defendants with regard to these defects, and Defendants' failure to act and prevented the injuries in this case, and in the related case referenced above.

42. DEFENDANTS (excluding CPSC) failed to warn of the above-described defects.

43. DEFENDANTS (excluding CPSC) failed to disclose the above-described defects to the consumers.

44. DEFENDANTS (excluding CPSC) failed to cure the above-described defects and did not effectively recall the products.

45. DEFENDANTS (excluding CPSC) partially recalled the fuel cylinders in the United States and Canada on January 17, 2012, but failed to take appropriate measures to bring the product defects to the attention of the consumer and the public. The recall was unreasonably silent.

46. The recall was misleading insofar as it did not disclose any of the actual defects referenced above.

47. Several of the torch tips produced by DEFENDANTS (excluding CPSC) appeared, visually, to have completely omitted the fracture groove feature, while the packaging in which the torch heads were marketed and sold contained photographs showing and describing the fracture groove feature on the back of the package.

48. As with the fuel cylinders, DEFENDANTS (excluding CPSC) knew of the defects with the torch heads, failed to warn the public and consumers, failed to recall the products, and severe injuries and deaths have resulted.

49. Plaintiff seeks punitive damages specifically on grounds that DEFENDANTS (excluding CPSC) could have prevented his injuries, and in fact, could have prevented the great many other injuries and deaths which occurred due to the above-described defects, simply by properly recalling and fixing these products, and by warning the users of the dangers and risks. DEFENDANTS (excluding CPSC) were capable of fixing these products and warning the users more than a decade ago, but failed to do so, which is the reason Plaintiff has suffered his severe burn injuries.

50. As explained above, the Court has ordered that the subject products be limited to the fuel containers that contain propane fuel only, and the torch apparatus be limited to the TS4000 model unit that was mounted to Mr. Peralta's cylinder at the time of failure of the product. Therefore, while there is reference to containers that contain MAPP fuel, this is to apprise CPSC of the concern and to preserve the record

only. The subject products are limited to fuel containers containing propane fuel and to the model TS4000 torch apparatuses pursuant to the Court's order stated from the bench at the December 4, 2017 hearing.

WHEREFORE, Plaintiff prays for judgment against all of the above named defendants for all damages suffered by Plaintiff as the result of the failure of his defective fuel cylinder and torch head product, in an amount of not less than $2,000,000, and further, for punitive damages based on malice and intentional failure to act and failure to warn, for recall of the subject products, for attorney's fees pursuant to statute, for costs of suit, and for such other and further relief as the court deems proper.

SECOND CAUSE OF ACTION FOR INTENTIONAL TORT

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a SECOND cause of as follows:

51. Based on information and belief, Plaintiff alleges that DEFENDANTS (excluding CPSC) have committed the intentional tort of fraud, including misrepresentation.

52. Based on information and belief, Plaintiff alleges Defendants (excluding CPSC) have committed the intentional torts of assault and battery.

53. Defendants (excluding CPSC) had actual knowledge of the fact that the subject fuel containers (in this instance containing propane fuel) were failing while being used in a manner which was intended by the manufacturer and which was foreseeable by the manufacturer, and possessed this knowledge from at least the year 2006, though more likely from the 1990's. Nevertheless, they marketed the subject fuel cylinder and torch products (here containing propane and limiting to the TS4000 torch apparatus) in total and complete silence as to the fact that these subject products had failed and were capable of failing while being used in a manner which was intended by the manufacturer and which was foreseeable by the manufacturer, causing

the users and consumers to believe that the products were safe to use and would not cause injury or death when used in an intended and foreseeable manner.

54. Defendants (excluding CPSC) were aware that the product users and consumers believed the subject products to be safe for use and were unaware that the subject products could fail and cause injury or death when used in an intended and foreseeable manner.

55. Plaintiff relied upon the actual and implied representations of Defendants (excluding CPSC) and therefore believed that the subject products would not fail and cause injury or death when used in an intended and foreseeable manner.

56. Plaintiff was using the subject products in an intended and foreseeable manner, when without being subjected to any abuse or misuse whatsoever, the fuel cylinder leaked fuel at the center bushing area, and the fuel ignited, causing plaintiff to drop the cylinder/torch assembly. The assembly hit the ground with the tip of theTS4000 torch containing the safety fracture groove feature. The fracture groove did not fracture, but instead, the fuel cylinder ripped open at the location of the center bushing. The fuel rushed out under tremendous pressure and caused severe burn injuries to plaintiff, as well as pressure and burn damage to his home.

57. Plaintiff is informed and believes, and on the basis of belief alleges that under Arizona law, the intentional torts of assault and battery take place where a defendant was consciously aware of the wrongful or harmful nature of his conduct and nonetheless persisted in that conduct, causing a harmful or offensive contact with the person of another, as well as simply putting the person in apprehension of a battery. (See Rawlings v. Apodaca, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986).)

58. Defendants (excluding CPSC) were consciously aware of the wrongful and harmful nature of their conduct in manufacturing, marketing, distributing and selling these very dangerous and lethal subject fuel containers and torch units (as limited to propane fuel and the TS4000 torch unit by Court order), and had actual

knowledge that some of the users of these products would inevitably suffer severe injuries, which at times could be fatal. Nevertheless, with knowledge of the inevitable injuries, Defendants (excluding CPSC) continued to manufacture, market, distribute and sell these subject products to the public. Plaintiff purchased one of these products, and it failed while he was using it in an intended and foreseeable manner, causing him severe extensive burn injuries, and damaging his home.

59. Plaintiff pleads and alleges intentional torts of fraud, misrepresentation, battery, and actual intent to cause harm by way of Defendants' (excluding CPSC) wrongful acts set forth above.

60. Plaintiff pleads that the wrongful acts described above amount to gross negligence as well as likely criminally culpable misconduct.

WHEREFORE, Plaintiff prays for all actual, general, and special damages according to proof at trial, for in particular, for punitive damages for the intentional torts of fraud, misrepresentation, assault and dbattery, in an amount to be determined by the trier of fact, and for such other and further relief as the Court deems proper.

THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF (CPSC)

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a THIRD cause of action, with respect to CPSC only, and based on information and belief, as follows:

61. CPSC was created by the United States Government to implement and enforce rules, regulations, requirements and procedures which must be followed by manufacturers and distributors of ultrahazardous substances and materials. It's creation was for the safety and protection of users of such products, and generally, for the public at large. As such, CPSC owed and owes Plaintiff, and all others similarly situated, a duty to act so as to cause the recall of dangerous ultrahazardous products, particularly products which are extremely flammable. (See the Federal Hazardous Substances Act (FHSA).)

62. Plaintiff alleges that the subject products fall within the purview of products the CPSC must regulate.

63. Plaintiff respectfully moves for declaratory relief establishing that the subject products fall within the purview of products the CPCS regulates, the subject products are defective and unreasonably safe, and the subject products are reasonably subject to recall by the CPSC for the safety and protection of the product users and the public at large.

Plaintiff respectfully demands trial by jury.

Dated: December 18, 2017

s/Andrew W. Shalaby
Andrew W. Shalaby, Attorney for Plaintiff Jason Peralta

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017 I caused the foregoing document to be filed electronically with the Clerk of this Court through the CM/ECF system for filing; and served on counsels of record via the Court's CM/ECM system.

Dated: December 18, 2017

s/Andrew W. Shalaby
Attorney for Plaintiff Jason Lou Peralta

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Attorneys for Plaintiff
Kurtis M. Bailey

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ILLINOIS

WESTERN DIVISION

KURTIS M. BAILEY, Plaintiff, vs. WORTHINGTON CYLINDER CORPORATION; WORTHINGTON INDUSTRIES, INC.; Defendants.	Case Number: 16 CV 07548 SECOND AMENDED COMPLAINT FOR 1. INJUNCTIVE RELIEF (PRODUCT RECALL); 2. PRODUCTS LIABILITY; 3. INTENTIONAL TORT; 4. DECLARATORY RELIEF REGARDING THE NON-APPLICATION OF *"Daubert"* IN FEDERAL COURT DIVERSITY JURISDICTION ACTIONS Demand for Jury Trial

NOTICE OF RELATED CASE

This case is related to the following case pending in the United States District Court for the Central District of California:

Lindsay Marmont et al. v. Bernzomatic, et al., 2:16-cv-00848-JAK-RAO as follows:

(a) This case and the related case involve the same product;

(b) This case and the related case involve the same defendants;

(c) the defects alleged in relation to the product are believed to be the same in both cases.

(d) the defense witnesses and experts are believed to be the same in both cases.

There is no related case of which Plaintiff is aware in the District Court for the Northern District of Illinois.

I. JURISDICTION

This is a product defect action which aries in relation to 49 CFR § 178 et seq., aka "Dot 39" (government mandated safety requirements). The amount in controversy exceeds $75,000. Plaintiff is a resident and citizen of Winnebago, Ill.

Based on information and belief, Plaintiff alleges that Defendant, WORTHINGTON CYLINDER CORPORATION, is incorporated in the State of Wisconsin, with it's principle place of business also located in Wisconsin. This defendant, on it's answer to this complaint, is expected to confirm this fact. See paragraph 4 below.

Based on information and belief, Plaintiff alleges that Defendant, WORTHINGTON INDUSTRIES, INC., is incorporated in the State of Ohio, with it's principle place of business also located in Ohio. This defendant, on it's answer to this complaint, is expected to confirm this fact. See paragraph 5 below.

II. VENUE

The injury at issue occurred in Winnebago County, Illinois, therefore venue is proper in this Court.

III. PARTIES

1. Plaintiff, Kurtis M. Bailey (hereinafter "Plaintiff"), is a competent adult individual, and a resident of Winnebago, IL.

2. Based on information and belief, Plaintiff alleges that WORTHINGTON CYLINDER CORPORATION, AND/OR WORTHINGTON INDUSTRIES, INC., purchased the brand name, "BERNZOMATIC," approximately in July 2011.

3. Based on information and belief, Plaintiff alleges that WORTHINGTON CYLINDER CORPORATION, AND/OR WORTHINGTON INDUSTRIES, INC. also do business as (dba) "BernzOmatic," to the extent that the brand name "BernzOmatic" exists on the subject fuel cylinder in this case. Plaintiff bases this information in part on the WORTHINGTON INDUSTRIES INC.'s internet posting located at: (http://worthingtonindustries.com/Company/Mergers-Acquisitions; http://worthingtonindustries.com/Products/Consumer-Tradesman-Products/Bernzomatic-(1).

4. Based on information and belief, Plaintiff alleges that WORTHINGTON CYLINDER CORPORATION, AND/OR WORTHINGTON INDUSTRIES, INC. also do business as (dba) WORTHINGTON CYLINDER WISCONSIN, LLC.

5. Based on the above facts, and on information and belief, Plaintiff alleges that there is complete diversity of citizenship, and therefore this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

IV. SUBJECT PRODUCTS

6. Based On information and belief, Plaintiff alleges that at all times relevant herein BERNZOMATIC was the manufacturer and/or marketer and producer of a handheld torch, consisting of three components: (1) a fuel cylinder, (2) an ultra

hazardous fuel (Propane or MAPP gas), and (2) a torch handle which mounted onto the cylinder, identified by part number "UL 2317 0913." These components shall jointly be referenced as the "subject torch," referring specifically to the torch products relevant to this action as further described below.

7. While the fuel cylinder in this action contained propane, this action seeks recall of several million defective cylinders, including seemingly identical metal cylinders containing a gas known as "MAPP" gas. All of these metal cylinders shall therefore be referenced throughout this complaint as "subject cylinders."

8. While the torch tip in this action is identified as "UL2317," this action includes another torch tip manufactured by Bernzomatic, known as the "TS 4000," and alleges that both of these torch tips contain the same defect. The defect is that these two torch tip designs include safety fracture groove features intended to cause the tip of the torches to break upon application of force in order to prevent the catastrophic breach and failure of the fuel cylinders, but in many instances these fracture groove features have failed, causing severe injuries and deaths. These torch tips also include a defective trigger-hold feature which allow the gas to emit from the tips while the user is holding the product by the fuel cylinder, also leading to several catastrophic failures, injury, and death. Both of these torch tip designs shall be referenced as the "subject torch tips" throughout this complaint.

FIRST CAUSE OF ACTION FOR INJUNCTIVE RELIEF
(COMPLIANCE WITH 49 CFR 178 et seq.)

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a FIRST cause of action as follows:

9. The subject fuel cylinders, ultra hazardous fuel, and torch tips, including their packaging, warning labels and disclosures, must comply with the requirements of 49 CFR section 178 et seq., also known as "Dot 39" requirements, imposed by the United States Federal Government. Based on information and belief, Plaintiff alleges

that the above-described products failed to comply with 49 CFR 178 et seq. in several regards, including but not limited to the following:

(A) The subject cylinders must contain brazed seams which are assembled to proper fit to ensure "complete penetration of the brazing material throughout" all "brazed joins." The subject cylinders do not comply with this requirement.

(B) The subject cylinders must contain brazed seams which have "design strength equal to or greater than 1.5 times the maximum strength of the shell wall."The subject cylinders do not comply with this requirement.

(C) The subject cylinders must contain "welded seams which are properly aligned and welded by a method that provides clean, uniform joins with adequate penetration." The subject cylinders do not comply with this requirement.

(D) The subject cylinders contain material used for welded openings and attachments which are of "weldable quality and compatibility with material of the cylinder." The subject cylinders do not comply with this requirement.

(E) When "one cylinder taken from the beginning of each lot, and one from each 1,000 or less successively produced within the lot thereafter" is "hydrostatically tested to destruction" as mandated, the entire lot is rejected if ever a "failure initiates in a braze or a weld or the heat affected zone thereof. The subject cylinders do not comply with this requirement.

(F) When the test done above results in a failure occurring in any opening, reinforcement, or at a point of attachment, the entire lot is rejected and discarded. The subject cylinders do not comply with this requirement.

(G) The subject cylinders must otherwise comply with all "Dot 39" requirements and thus meet minimum required governmental safety requirements. The subject cylinders do not comply with this requirement.

10. Plaintiff suffered severe burn injuries on May 20, 2014 when the cylinder he was using had breached and failed. The failure of the cylinder owned by the

plaintiff was the result of the failure of his cylinder, and generally, the subject cylinders, to comply with the requirements of 49 CFR § 178. The cylinder owned by the plaintiff was weak and substandard, causing the fuel cylinder to fail and breach upon contact of the tip of the torch with a solid object, while the fuel and emission lock was engaged on the torch tip. This resulted in a catastrophic failure which has caused severe burn injuries to the plaintiff in this action.

11. Plaintiff seeks recall of the subject fuel cylinder, and all of the subject cylinders, on behalf of himself and on behalf of the general public, under federal private Attorney General statute, and also under the private attorney general statutes of the States of California and Illinois.

12. Plaintiff is entitled to statutory attorney fees under the private attorney general statutes referenced above.

13. WHEREFORE, Plaintiff prays for a prohibitory injunction to be imposed upon BERNZOMATIC, and all the named defendants, to recall all of the defective cylinders, and comply wi 49 CFR § 178 et seq. in production and distribution of the above said products in interstate commerce and at all locations where sold and distributed throughout the United States and worldwide. Plaintiff further prays for actual damages in an amount of not less than $2,000,000, punitive damages according to proof a set forth below, statutory attorney's fees, costs of suit, and such other and further relief as this court deems proper.

SECOND CAUSE OF ACTION FOR NEGLIGENCE (PRODUCTS LIABILITY)

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a SECOND cause of action, on information and belief, as follows:

14. The subject fuel cylinders, including the fuel cylinder which failed and severely injured the plaintiff, contain both design and manufacturing defects at the uppermost portion of the cylinders. The defects include but are not limited to an

improper and substandard connection between the narrow thread assembly located at the top of the cylinder and the horizontal surface of the cylinder to which it attached, a defective design with a pressure relief valve that causes it to sometimes fail and lead to a catastrophic explosion of the cylinder, and poor quality of products and materials which sometimes lead to the production of cylinders which are incapable of withstanding the amount of force they were designed to withstand before breach. The most frequent and prevalent failures occur between the welded joining of the narrow thread assembly and the horizontal surface of the cylinder. There have been many such failures throughout the country and worldwide with these products produced by Bernzomatic.

15. The defects with the subject torch heads, including the torch head used by the plaintiff at the time of injury in this case, exist on the safety feature known as the "fracture groove" of the torch heads. The application of force to the tip of the torches was deemed a foreseeable event by Bernzomatic, and prompted the design and implementation of the fracture groove features in the torch heads. However, in every known incident of failure of the fuel cylinder upon the application of pressure to these torch tips, in the many cases and litigation materials in the possession of this plaintiff, the torch head fracture groove features have failed to fracture and prevent the catastrophic failure of these fuel cylinders. Many of these actual failed devices are posted on a website located at www.Bernzomaticinjuries.com .

16. Bernzomatic is aware of the existence of the above-described defects, and in the year 2008, by way of misrepresentation to a web hosting service, had a website "Bernzomaticinjuries.com" taken down. The holder of the domain was successful in putting the website back up, only to be met with a complaint filed on November 21, 2008 by Bernzomatic, which was filed with the "World Intellectual Property Organization Arbitration and Mediation Center" in Switzerland, in an effort to remove the website so that the public would not be made aware of these defects. The action

was not successful, and further, establishes the actual knowledge and awareness of Bernzomatic of these defects, and failure to act and prevented the injuries in this case, and in the related case referenced above.

17. Bernzomatic failed to warn of the above-described defects.

18. Bernzomatic failed to disclose the above-described defects to the consumers.

19. Bernzomatic failed to cure the above-described defects and did not effectively recall the products. Bernzomatic partially recalled the fuel cylinders in the United States and Canada on January 17, 2012, but failed to take appropriate measures to bring the product defects to the attention of the consumer and the public. The recall was unreasonably silent.

20. Several of the torch tips produced by Bernzomatic appeared, visually, to have completely omitted the fracture groove feature, while the packaging in which the torch heads were marketed and sold contained photographs showing and describing the fracture groove feature on the back of the package.

21. As with the fuel cylinders, Bernzomatic knew of the defects with the torch heads, failed to warn the public and consumers, failed to recall the products, and severe injuries and deaths have resulted.

WHEREFORE, Plaintiff prays for judgment against all of the above named defendants for all damages suffered by Plaintiff as the result of the failure of his defective fuel cylinder and torch head product, in an amount of not less than $2,000,000, and further, for punitive damages based on malice and intentional failure to act and failure to warn, for recall of the subject products, for attorney's fees pursuant to statute, for costs of suit, and for such other and further relief as the court deems proper.

///

THIRD CAUSE OF ACTION FOR INTENTIONAL TORT

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a THIRD cause of action, based on information and belief, as follows:

22. Bernzomatic was aware of the defects with the subject products as described above for many years before the injury to this plaintiff and to the plaintiff in the above-referenced related action.

23. Bernzomatic's awareness of the existence of the above-described defects is evidenced by its action in illegally taking down the website, which is located at : "www.Bernzomaticinjuries.com," as well as its initiation of the action in Switzerland to try to remove the website in the year 2008.

24. Bernzomatic failed to warn plaintiff and all other consumers of the above-described product defects, and failed to take reasonable measures to remove and retrieve from consumers the defective products before plaintiff, as well as the plaintiff and the related action, and several other persons, suffered severe injuries, including death of the person described in the related action.

25. Punitive damages are warranted and appropriate based on the above described wrongful conduct of all of the above-named defendants.

WHEREFORE, Plaintiff prays for judgment against all of the above named defendants for all damages suffered by Plaintiff as the result of the failure of his defective fuel cylinder and torch head product, in an amount of not less than $2,000,000, and further, for punitive damages based on malice and intentional failure to act and failure to warn, for recall of the subject products, for attorney's fees pursuant to statute, for costs of suit, and for such other and further relief as the court deems proper.

///

FOURTH CAUSE OF ACTION FOR DECLARATORY RELIEF RE INAPPLICABILITY OF "DAUBERT" IN DIVERSITY CASES

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a FOURTH cause of action as follows:

26. Federal Courts sitting in diversity are applying expert witness admissibility standards as articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 [125 L. Ed. 2d 469] (1993). However, *Daubert* was a California diversity jurisdiction case itself, and had a 4-judge dissent at the Supreme Court level. Plaintiff moves to have this admissibility standard declared inapplicable on grounds that the law at issue is substantive rather than procedural, and leads to a different outcome in many instances than would the application of State law. This allegation is based in part on the fact that in at least one similar Federal Court case, alleging the same basic defects pertaining to the same products and involving these same defendants, a plaintiff's expert witness met the qualifications and admissibility requirements for expert witness testimony under State law (California), but was nevertheless disqualified under *Daubert* in Federal Court, leading to dismissal of a case that otherwise would likely have resulted in a recall years earlier, hence prevention of this plaintiff's injuries and the deaths that have occurred since dismissal of said other action, hence deeming *Daubert* and F.R.Evid. Rules 702 and 703 substantive rather than procedural in nature, and warranting the remedy requested.

A jury trial is respectfully demanded in this action.

Dated: September 23, 2016

s/Andrew W. Shalaby
Andrew W. Shalaby, Attorney for Plaintiff Kurtis M. Bailey

EXHIBIT B

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Attorneys for Defendants
Worthington Industries, Inc.; Worthington Cylinder Corporation; Worthington Cylinder Corporation, LLC; and Worthington Cylinders Wisconsin, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jason Lou Peralta, Plaintiff, v. Bernzomatic; Worthington Industries, Inc.; Worthington Cylinder Corporation; Worthington Cylinder Corporation, LLC; Worthington Cylinder Wisconsin, LLC; Defendants.	Case No. 2:17-cv-03195-DMF

WORTHINGTON INDUSTRIES, INC., WORTHINGTON CYLINDER CORPORATION; WORTHINGTON CYLINDER CORPORATION, LLC AND WORTHINGTON CYLINDERS WISCONSIN, LLC'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSTHON OF JOHN NELSON AND DAVID THOMAS

Worthington Industries, Inc., Worthington Cylinder Corporation, Worthington Cylinder Corporation, LLC and Worthington Cylinders Wisconsin, LLC (collectively "Worthington") object to plaintiff's notice of deposition for John Nelson and David Thomas, currently scheduled for December 19 and 20, 2018, respectively, as follows:

1. Despite the court's order prohibiting discovery on cylinders other than "NRT" propane cylinders, Plaintiff's notice indicates that the matters covered in the depositions will include issues with "NRT" fuel cylinders without any limitation to propane NRT cylinders. Plaintiff has previously sought discovery on MAPP gas cylinders and court has disallowed such discovery.

2. Despite the court's order prohibiting discovery on cylinders other than "NRT" propane cylinders, Plaintiff's document request seeks documents "pertaining to the Non-Refillable tall ('NRT') cylinders containing all types of flammable fuels ..." Plaintiff has previously sought discovery on MAPP gas cylinders and court has disallowed such discovery.

3. If the plaintiff pursues such discovery in violation of the Court's orders, Worthington reserves the right to seek all possible remedies and sanctions against the plaintiff and counsel.

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\\

Respectfully submitted,

By: /s/ Richard A. Ergo

Richard A. Ergo
Jason J Granskog
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rergo@bowlesverna.com
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Attorneys for Defendants Worthington Industries, Inc.; Worthington Cylinder Corporation; Worthington Cylinder Corporation, LLC and Worthington Cylinders Wisconsin, LLC

PROOF OF SERVICE
Peralta v. Worthingtonton Industries, Inc., et al.
USDC, District of Arizona, Case No. 2:17-cv-03195-DMF

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & VERNA LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On November 8, 2018, I served the following document(s):

WORTHINGTON INDUSTRIES, INC., WORTHINGTON CYLINDER CORPORATION; WORTHINGTON CYLINDER CORPORATION, LLC AND WORTHINGTON CYLINDERS WISCONSIN, LLC'S OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSTIION OF JOHN NELSON AND DAVID THOMAS

on the following parties in this action addressed as follows:

ANDREW W. SHALABY (# 206841)
7525 Leviston Avenue
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Telephone: (510) 551-8500
Facsimile: (510) 725-4950
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Attorney for Plaintiff
JASON LOU PERALTA

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Co-Counsel for Defendants
Worthington Industries, Inc., Worthington Cylinder Corporation and Worthington Cylinder Wisconsin

DAVID WEI CHEN
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1300 Clay Steet, Suite 600
Oakland, CA 94612-1427
(510) 575-0851
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XXX **BY UNITED STATES MAIL:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

_____ **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

_____ **BY PERSONAL SERVICE:** I caused to be served each document listed above by hand to each addressee above. Delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office.

_____ **BY FAX TRANSMISSION:** By use of facsimile machine number (925) 935-0371, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

XXX **BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM:** In accordance with the electronic filing procedures of this Court, service has been effected on the aforementioned party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic service through CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 8, 2018, at Walnut Creek, California.

Teresa L. Everett

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

KURTIS M. BAILEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 16-cv-7548
	)	Judge Philip G. Reinhard
BERNZOMATIC, et al.,	)	Magistrate Judge Iain D. Johnston
	)	
Defendants.	)	

WORTHINGTON CYLINDER CORPORATION AND WORTHINGTON INDUSTRIES, INC., OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSTIION OF JOHN NELSON AND DAVID THOMAS

Worthington Cylinder Corporation and Worthington Industries, Inc., (collectively "Worthington") object to plaintiff's notice of deposition for John Nelson and David Thomas, currently scheduled for December 19 and 20, 2018, respectively, as follows:

1. Despite the court's order prohibiting discovery on cylinders other than "NRT" propane cylinders, Plaintiff's notice indicates that the matters covered in the depositions will include issues with "NRT" fuel cylinders without any limitation to propane NRT cylinders. Plaintiff has previously sought discovery on MAPP gas cylinders and court has disallowed such discovery.

2. Despite the court's order prohibiting discovery on cylinders other than "NRT" propane cylinders, Plaintiff's document request seeks documents "pertaining to the Non-Refillable tall ('NRT') cylinders containing all types of flammable fuels ..." Plaintiff has previously sought discovery on MAPP gas cylinders and court has disallowed such discovery.

3. The Court has imposed a stay of this action pending the decision whether to revoke Andrew Shalaby's pro hac vice status with an exception as to matters the parties agree to perform. Worthington had agreed to these depositions, but did not expect that counsel would seek documents and/or testimony in areas previously excluded by the Court. Accordingly, Worthington withdraws its previous agreement.

If the plaintiff pursues such discovery in violation of the Court's orders, Worthington reserves the right to seek all possible remedies and sanctions against the plaintiff and counsel.

Respectfully submitted,

By: /s/ Richard A. Ergo /s/ James W. Ozog

Richard A. Ergo
Jason J Granskog
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Attorney for Defendants Worthington Cylinder Corporation and Worthington Industries, Inc.

PROOF OF SERVICE
Bailey v. Bernzomatic, et al.,
USDC, Central District of Illinois, Case No. 1:16-cv-07548

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & VERNA LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On November 8, 2018, I served the following document(s):

WORTHINGTON CYLINDER CORPORATION AND WORTHINGTON INDUSTRIES, INC., OBJECTION TO PLAINTIFF'S NOTICE OF DEPOSTIION OF JOHN NELSON AND DAVID THOMAS

on the following parties in this action addressed as follows:

ANDREW W. SHALABY (# 206841)
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KURTIS M. BAILEY

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Attorney for Defendant
WORTHINGTON CYLINDER CORPORATION and WORTHINGTON INDUSTRIES, INC.

XXX **BY UNITED STATES MAIL:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

_____ **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

_____ **BY PERSONAL SERVICE:** I caused to be served each document listed above by hand to each addressee above. Delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office.

_____ **BY FAX TRANSMISSION:** By use of facsimile machine number (925) 935-0371, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

XXX **BY ELECTRONIC SERVICE VIA E-MAIL AND/OR CM/ECF SYSTEM:** In accordance with the electronic filing procedures of this Court, service has been effected on the aforementioned party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic service through CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 8, 2018, at Walnut Creek, California.

Teresa Everett

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.2.2
Eastern Division

Kurtis M. Bailey

Plaintiff,

v.

Case No.: 1:16−cv−07548
Honorable Philip G. Reinhard

Bernzomatic, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, November 20, 2018:

MINUTE entry before the Honorable Iain D. Johnston: Status report [399] received and reviewed. The report describes what appears to be ongoing discovery being conducted in this case. The Court notes that a stay remains in place. See Dkts. 397, 376, 362, 290. The Court will address this concern after the stay is lifted. Until the stay is lifted, there shall be no further filings from the parties. (yxp,)

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JASON LOU PERALTA, Plaintiff, v. WORTHINGTON INDUSTRIES, INC.; WORTHINGTON CYLINDER CORPORATION; WORTHINGTON CYLINDER, LLC; BERNZOMATIC COMPANY, Defendants.	NO.2:17-cv-03195JJT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

KURTIS M. BAILEY, Plaintiff, v. WORTHINGTON CYLINDER CORPORATION; WORTHINGTON INDUSTRIES, INC. Defendants.	NO. 1:16-cv-07548

WITNESS: MICHAEL RIDLEY

VOLUME I

Video-Deposition of MICHAEL RIDLEY, a non-party witness called for Oral Examination in the above-entitled action, said deposition being taken pursuant to Rules governing Federal Procedure in the State of New York, held at the offices of GIBBONS, PC, One Pennsylvania Plaza; New York, New York on Friday, January 26, 2018 commencing at 10:03 a.m., before MICHAEL WILLIAMS, a Notary Public and Registered Professional Court Reporter.

A P P E A R A N C E S:

FOR THE PLAINTIFFS KURTIS M. BAILEY and JASON LOU PERALTA:

EAST BAY LAW
1417 Solano Avenue
Albany, California 94706
BY: ANDREW W. SHALABY, ESQ.

FOR THE DEFENDANTS WORTHINGTON CYLINDER CORPORATION and WORTHINGTON INDUSTRIES, INC.:
BOWLES & VERNA, LLP

2121 N. California Blvd.
Walnut Creek, California 94596
BY: RICHARD A. ERGO, ESQ.

FOR THE DEPONENT:
FROST BROWN TODD, LLC

3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
BY: BETH SCHNEIDER NAYLOR, ESQ.

ALSO PRESENT:

Sonia Dunn-Ruiz - Paralegal
Larry Moskowitz - Videographer

I N D E X

E X H I B I T S

L I T I G A T I O N S U P P O R T

I N S E R T S

DESCRIPTION	PAGE/LINE
(None)	

M A R K E D F O R R U L I N G

QUESTION	PAGE/LINE
(None)	

R E Q U E S T S F O R P R O D U C T I O N

DESCRIPTION	PAGE/LINE
(None)	

THE VIDEOGRAPHER: Good morning. We are now on the record. This is the videotape deposition of Michael Ridley taken by the defendants in the matter of Jason Lou Peralta versus Worthington Industries, Inc, et al., Kurtis M. Bailey versus Worthington Cylinder Corporation, et al. in the United States District Court for the Northern District of Illinois.

This deposition is being held at Gibbons, One Penn Plaza; New York, New York on January 26, 2018.

My name is Larry Moskowitz from U.S. Legal Support, and I'm the video legal specialist. The court reporter is Michael Williams also from U.S. Legal Support.

We're going on the record at 10:04 a.m., and counsel will now state their appearances for the record.

MR. ERGO: Richard Ergo for the Worthington entities and also the Peralta case is pending in the District Court in Arizona.

MR. SHALABY: Andrew Shalaby for both the plaintiffs and Sonia Dune-Ruiz with me my paralegal, both plaintiffs.

MS. SCHNEIDER NAYLOR: Attorney Beth

Schneider Naylor appearing on behalf of the deponent Michael Ridley.

THE VIDEOGRAPHER: Will the reporter please administer the oath.

MICHAEL RIDLEY,

called as a witness, having first been duly sworn, testifies as follows:

MS. SCHNEIDER NAYLOR: As counsel for the deponent Michael Ridley, I'd like to put a statement on the record that neither the deponent, Michael Ridley, nor his employer Newell, are parties in either the Bailey or the Peralta lawsuits in which this deposition is being taken.

Mr. Ridley has agreed to appear at the request of Defendant Worthington to provide third-party fact testimony regarding the fracture work.

EXAMINATION

BY MR. ERGO:

Q. All right. Good morning, Mr. Ridley.

A. Good morning.

Q. Could you state your full name.

A. Michael Ridley.

Q. Okay.

MR. ERGO: Almost done with those two questions?

MR. SHALABY: I'm done, Mr. Ridley. Thank you very much.

MR. ERGO: No further questions.

THE VIDEOGRAPHER: We're going off the record. The time is 2:56 p.m. This is the end of tape 4.

(Time noted: 2:56 p.m.)

_____

MICHAEL RIDLEY

Subscribed and sworn to before me this _____ day of _____, 20_____.

_____

Notary Public

EXHIBIT E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Andrew W. Shalaby , Plaintiff, v. Bernzomatic, et al., Defendants.	Case No.: 11-cv-0068-AJB-DHB **ORDER DENYING SHALABY'S MOTION TO SET ASIDE THE COURT'S JANUARY 5, 2018 ORDER (Doc. No. 82)**

Pro se plaintiff Andrew Shalaby, a California-licensed attorney, moved to terminate a prefiling order put in place by this Court in 2012. (Doc. No. 72.) The Court, not convinced the order should be lifted, denied his request. (Doc. No. 79.) Shalaby then moved for permission to file a brief responsive to the Court's order, which the Court granted. (Doc. No. 80.) Shalaby now requests relief from the Court's prior order, arguing primarily that the Court overlooked the fact that Bernzomatic no longer exists to benefit from the prefiling order. (Doc. No. 82 at 2.) But because the Court is not confident Shalaby will respect the legal impediment in filing suit against the defendants, the Court **DENIES** his request, without prejudice. The Court will address Shalaby's various arguments in turn.

A. The Court is Not Angry with Shalaby

Shalaby first accuses the Court of being angry with him. (*Id.* at 3–4.) However, the Court's initial decision to enter a prefiling order—and its recent ruling preserving that

order—was not done in anger or vindictiveness. While the Court sympathizes with the victims Shalaby represents, it is ultimately duty-bound to the law.

B. Bernzomatic's Non-Existence

Shalaby next argues that a change in facts requires termination of the prefiling order. (*Id.* at 2.) As Shalaby succinctly states, "there is no 'Bernzomatic.'" (*Id.*) Shalaby affirms Worthington Industries manufactured the subject products, but argues he "has never sued Worthington in all these years, providing about as solid of evidence as can be that Shalaby would never have filed another suit against Bernzomatic, regardless of the fact that the entity no longer exists." (*Id.*)

Defendants respond that the prefiling order covers parties other than Bernzomatic. (Doc. No. 83 at 2.) The prefiling order itself sets forth that "Andrew Shalaby must seek and obtain leave of this Court, prior to filing any new actions, **against any defendant**, in any forum, based upon, or related in any way, to injuries he sustained as a result of the accident on April 21, 2006." (Doc. No. 66 at 8 (emphasis added).) Defendants note this includes others beyond Bernzomatic, such as Worthington, Newell Operating Company, and Irwin Industrial Tool Company. (Doc. No. 83 at 2.) Defendants maintain that because these companies do exist and have exposure to lawsuits, the prefiling order continues to be necessary. (*Id.* at 2–3.)

Defendants are correct. The prefiling order was not put in place solely to protect Bernzomatic from suit, otherwise the order would be obsolete. The order's purpose is to limit Shalaby from filing an action without the Court's approval against any defendant relating to Shalaby's incident. And as the Court has held its orders are applicable to the other entities in place of the now-defunct Bernzomatic, they still have liability in this matter. (*Id.* (discussing Worthington in an order denying Shalaby's motion to set aside a protective order in Case No. 07-cv-2107-MMA-BLM).)

C. Defendants' Supplemental Filings

Three days after the Court held a hearing on this motion, defendants filed a relevant supplemental document. (Doc. No. 85.) In this supplemental filing, defendants attached

two opinions from the Northern District of Illinois and the District of Arizona. (*Id.*)

In the first opinion, Magistrate Judge Johnston expresses incredulity at the case before him. He declares: "This case is a straight-forward products liability case, which despite the court's efforts, has turned into a nearly uncontrollable side-show . . . . the vast majority of the blame has been caused by [Shalaby]." (Doc. No. 85-1 at 2.) Judge Johnston summarizes Judge Tuchi's order from the District of Arizona, and waxes how both cases have experienced difficulty because of Shalaby. (*Id.* ("nearly all the problems that Judge Tuchi has encountered in his case relating to Mr. Shalaby have occurred in the case before this Court.")) Most concerning, Judge Johnston wrote:

> In a subsequent filing to Judge Tuchi, which was also emailed to this Court, Mr. Shalaby notes that he is having medical issues and, according to Mr. Shalaby, the medication he is taking may be impairing his abilities and judgment. I am not a doctor, and, so, I cannot form an opinion on that representation. But the Court can state that, from the onset of the case, Mr. Shalaby's filings, statements and representations are less than linear. Early on, the Court noted that the filings were, at times, internally inconsistent and contradictory. Moreover, Mr. Shalaby's representations have been conflicting. His recent 180 degree change in litigation strategy as to whether he would be retaining an opinion witness is just one example. Moreover, as noted by Judge Tuchi's ruling, Mr. Shalaby appears to operate under the assumption that court orders and directions are mere suggestions that he can revisit at any time.

(*Id.* at 3.) Judge Johnston—in order to "regain control of this case"—drastically hit "the reset button" and struck all pending motions pending "the conclusion of Mr. Shalaby's medical treatment." (*Id.*) Pertinent to this ruling is the date—February 5, 2018—merely days after the Court's February 2 motion hearing. (*Id.*) Although this Court is not solely relying on Judge Johnston's ruling in this order, it does corroborate the Court's underlying concern that Shalaby, repeatedly, ignores Court orders and continually re-litigates issues the Court ruled on, old and new. And because it was recently filed, the Court finds its relevance significant.

D. Rule 11 Sanctions Not Required Prior to a Prefiling Order

Next, Shalaby argues Rule 11 sanctions were required before imposing a prefiling

order, but fails to cite any supporting case law supporting this argument. (*Id.*) While one Court's holding suggests a pre-filing order is a type of Rule 11 sanction, there is no case law requiring sanctions be imposed *before* a prefiling order is established. *See West v. Maxwell*, No. C10–5275BHS, 2010 WL 3489551, at *7 (W.D. Wash. Sept. 1, 2010) ("The Court concludes that the pre-filing order against West is a sufficient sanction under Rule 11 of the Federal Rules of Civil Procedure . . . ."); *Galeska v. Duncan*, 894 F. Supp. 1375, 1381 (C.D. Cal. June 29, 1995) ("FRCP Rule 11 authorizes sanctions of a non-monetary nature. Fed. R. Civ. P. 11(c)(2). The Fifth Circuit has imposed pre-filing restrictive orders pursuant to FRCP Rule 11.").

Shalaby claims that because he stated under penalty of perjury he would not file another suit against Bernzomatic, the Court should terminate the prefiling order. (Doc. No. 82 at 6.) And, at the hearing, Shalaby offered a host of other sanctions the Court could place on him should he break his promise not to file another case based on his cause of action. However, as mentioned previously, the order extends to entities beyond Bernzomatic who still have exposure and thus deserve the benefit of the prefiling order. Defendants made a convincing argument, supported by Judge Johnston's and Judge Tuchi's orders, that these other options—sanctions, bar reporting, limitations defenses—will not stop Shalaby from filing, forcing the now-defunct Bernzomatic, and its progeny, into more costly litigation.

E. <u>The Court's Previous Denial of Shalaby's Expert Witness</u>

Shalaby also attempts to re-litigate a decision made in his previously filed action, Case No. 07-cv-2107-MMA-BLM. (Doc. No. 82 at 5.) There, the Court disqualified his expert witnesses without granting leave to cure, which, as Shalaby argues, "lead to the deaths of Ms. Marmong, Mr. Tram, and likely several others . . . ." (*Id.*) Referencing an Illinois Court who hired its own expert witnesses, he now requests this Court remedy the mistake made years ago. (*Id.*) However, because that decision was made by a different District Judge on another case against different defendants, this Court will not address it. The Court notes, however, that this is an example of Shalaby's attempts to appeal an order

made years prior.

F. Conclusion

Shalaby appears to have a history of disrespecting court orders. The defendants, at this time, have convinced the Court that the risk of filing another suit outweighs any prejudice Shalaby faces by having the prefiling order in effect. Shalaby has not been stopped from bringing claims on behalf of his clients in other courts. Although the Court sympathizes with Shalaby's plight and the prefiling's order effect on his other cases, the Court believes the issue is better handled through protective, summary judgment, or *in limine* motions. Moreover, Judge Johnston's recent decision instilled doubt on this Court that Shalaby will uphold the representations he made to not file due to the possible reprimands that could befall him; nor is the Court convinced those hurdles would prevent Shalaby from filing once more should the prefiling order be lifted.

For these reasons, the Court **DENIES** without prejudice Shalaby's motion to set aside its previous order, (Doc. No. 82), and once again denies terminating the prefiling order at this time.

IT IS SO ORDERED.

Dated: February 28, 2018

Hon. Anthony J. Battaglia
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Andrew W. Shalaby , Plaintiff, v. Bernzomatic, et al., Defendants.	Case No.: 11-cv-0068-AJB **ORDER DENYING PLAINTIFF'S MOTION TO TERMINATE PREFILING ORDER (Doc. No. 72)**

Pro se plaintiff Andrew Shalaby, a California-licensed attorney, moves to terminate a prefiling order put in place by this Court in 2012. (Doc. No. 72.) Because Shalaby has not convinced the Court the order should be lifted, the Court **DENIES** his request without prejudice.

After litigating for over six years against Bernzomatic for injuries Shalaby sustained while using a torch product, the Court granted Bernzomatic's motion for a prefiling order. (Doc. No. 66.) For brevity's sake, the Court will not reiterate the legion of complaints, reconsideration motions, ex parte applications, rehearing petitions, recusal motions, and appellate motions Shalaby has filed. Those filings were meticulously detailed in a Bernzomatic motion, (*see* Doc. No. 6 and its accompanying exhibits, Nos. 6-3, 6-6), as well as the prefiling order itself, (Doc. No. 66 at 5–7). Shalaby now argues the "ancient" prefiling order unfairly prejudices his clients and "besmirches" his reputation.

(Doc. No. 72 at 2–3.) He contends there is "no possibility of [Shalaby] filing another action on his behalf arising in relation to any aspect of this old lawsuit." (*Id.* at 2.) Bernzomatic disagrees, stating the prefiling order is narrowly tailored and only prevents him from filing lawsuits on his own behalf regarding injuries related to the initial product liability case. (Doc. No. 74 at 5.) Bernzomatic fears lifting the prefiling order will open the gate for Shalaby to continue his crusade. (*Id.*)

Shalaby fails to show any legal grounds for relief in his motion, but merely argues the order should be terminated. His relief could be granted under Rule 60(b), through a reconsideration motion, or under California law. He is years late for a reconsideration motion, thus it is the Court's best guess he is attempting to use Rule 60(b) as an appeal of sorts. Rule 60(b) allows for relief from a final order when there is mistake, neglect, newly discovered evidence, fraud, misrepresentation, misconduct, a judgment is void or has been satisfied, released, or discharged, or any other reason which justifies relief. Fed. R. Civ. P. 60(b). Shalaby offers no grounds for relief under Rule 60(b)(1)–(5), nor do his complaints meet the Rule 60(b)(6) catch-all—a tool to be "used sparingly as an equitable remedy to prevent manifest injustice" and "utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). His contentions of prejudice and embarrassment simply do not rise to the level of manifest injustice or extraordinary circumstances warranting reversal.

Shalaby fares no better under California law. Under California Code of Civil Procedure § 533, a prefiling order is considered an injunction and thus is subject to modification if there is (1) a change in the facts, (2) a change in the law, or (3) to meet the ends of justice. C.C.C.P. § 533; *Luckett v. Panos*, 73 Cal. Rptr. 3d 745, 750 (2008). Shalaby fails to present evidence supporting a modification. He does not cite to any intervening change in facts or law, rather, his motion argues the prefiling order is unjust and prejudicial towards him and his clients. However, Shalaby's case is a tale of chosen fate. He was repeatedly warned that continued filings disregarding the Court's orders would result in a

prefiling order. Indeed, the Court initially declined Bernzomantic's prefiling order request, only to grant it seven-months-and-a-handful-of-unsubstantiated-reconsideration-motions later.

It is apparent the prefiling order has not prevented Shalaby from filing complaints on behalf of his clients around the country. In his motion, he discusses cases filed in Illinois and Arizona. (Doc. No. 72 at 4.) While the Court sympathizes with Shalaby's undoubted frustration with defendants in those actions using the prefiling order in their motions, Shalaby has not shown any proof of actual prejudice against those clients. (Doc. No. 72-2 at 3.) The prefiling order was purposely narrowly tailored to prevent such a thing; it only precludes Shalaby from filing actions on his own behalf regarding the specific incident which gave rise to his suit against Bernzomatic in the first place. Or rather, as Bernzomatic succinctly states, "[The prefiling order] does not *prevent* Mr. Shalaby from doing anything. Rather, it requires the Court to review any filings made by Mr. Shalaby *related to his own injuries* before he proceeds with filing." (Doc. No. 74 at 10.)

Moreover, the Court is unpersuaded by Shalaby's attempts to insinuate that the prefiling order has caused—or is causing—injuries and deaths to consumers or prevents injured consumers from seeking justice. (*See* Doc. No. 72 at 4–5.) Shalaby pleads, "[t]he several cases I have in which I represent plaintiff-victims of these products will bring an end to the injuries and deaths, but the added burden and hurdle of the prefiling order in this case continues to be quite an unnecessary obstacle." (*Id.*) The argument is nonsensical, as the prefiling order only extends to actions brought by Shalaby himself, his wife, or any person acting on their behalf, and only includes actions filed regarding injuries Shalaby sustained from the April 21, 2006 accident. Shalaby is free to file actions on behalf of other clients without jumping through the prefiling order's hoops.

The Court finds the ends of justice continue to be adequately served with the prefiling order in place. Despite his claim defendants are using the prefiling order to "besmirch" his reputation, he provides no evidence of such. Despite his claim his clients are being unfairly prejudiced, he continues to file cases in his march against Bernzomatic

and his belief the products are defective. And, despite other defendants noting the prefiling order's existence in their moving papers, Shalaby has not shown any consequences have befallen him or his clients from the order's continuation.

Thus, the Court **DENIES** Shalaby's motion to terminate the prefiling order without prejudice. *Luckett*, 73 Cal. Rptr. at 752 ("The denial without prejudice is an implied recognition . . . that vexatious litigant status should be erasable in appropriate circumstances." (internal quotations omitted)).

IT IS SO ORDERED.

Dated: January 5, 2018

Hon. Anthony J. Battaglia
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Andrew W. Shalaby, Plaintiff, v. Bernzomatic, et al., Defendants.	Case No.: 11-cv-0068-AJB-DHB **ORDER DENYING RELIEF (Doc. Nos. 94, 98)**

In 2012, the Court issued a prefiling order in this case. (Doc. No. 66.) In 2017, Shalaby filed a motion to set aside the prefiling order, which the Court denied. (Doc. Nos. 72, 79.) Shalaby then immediately requested the Court to reconsider *that* motion, which again, the Court denied. (Doc. Nos. 80, 86.) Since the Court denied his second reconsideration motion to terminate the prefiling order, there have been 19 documents filed over three months—most of which are filings requesting the Court to reconsider terminating the prefiling order. (Doc. Nos. 90, 95, 97, 98, 99, 102, 103, 105.)

Yet, in none of these supplemental filings does Shalaby give the Court a valid legal justification to overturn its two previous orders denying reconsideration. In nearly each motion, Shalaby questions the rulings of judges from different districts, (Doc. No. 95); requests this Court issue a protective order on public documents to prevent their use in other courts, (*Id.* at 2); accuses defendants of weaponizing the prefiling order in other

actions, (Doc. Nos. 99-1 at 2–3; 105 at 2); and generally relitigates the underlying issues from his trial, (Doc. No. 99-1 at 3).

Shalaby has not presented the Court with an intervening change in the law or the facts of his case to warrant reconsideration under the local rules. CivLR 7.1(i). He also has not presented a relevant argument justifying relief under Federal Rule of Civil Procedure 60. This Court cannot prevent any opposing counsel from using publicly-filed documents in their cases. Moreover, even if this Court were to terminate the prefiling order, it could not prevent the fact that one existed for a number of years from being introduced by opposing counsel in other courts. The Court declines addressing Shalaby's other arguments regarding this Court's impartiality, (*see* Doc. No. 95 at 5), or any role Shalaby accuses the Court in playing in his clients' injuries, (*see* Doc. No. 98 at 3).

The Court notes that Shalaby's repeated and unavailing arguments and motions are partially what led the Court to deny his first two reconsideration requests. Having heard Shalaby's objections to the supplemental filing, the Court **DECLINES** to order further relief and now considers the matter final.

IT IS SO ORDERED.

Dated: August 8, 2018

Hon. Anthony J. Battaglia
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANDREW W. SHALABY Plaintiff, v. BERNZOMATIC, an unincorporated Division of IRWIN INDUSTRIAL TOOL COMPANY; IRWIN INDUSTRIAL TOOL COMPANY; NEWELL OPERATING COMPANY, INC., and DOES 1 through 50, INCLUSIVE; Defendants.	Civil No. 11cv68 AJB (POR) ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING MOTION FOR PREFILING ORDER [Doc. No. 57, 61]

On April 19, 2012, Plaintiff Andrew Shalaby filed a motion for reconsideration. (Doc. No. 57) The Plaintiff supports his motion for reconsideration by arguing that he has discovered new evidence that he was unable to discover earlier. (*Id.* at 3.) On May 4, 2012, Defendants, Bernzomatic et al., filed an opposition and a motion for prefiling order. (Doc. No. 61) On May 9, 2012, the Plaintiff filed a reply. (Doc. No. 62) Based upon the parties' moving papers and for the reasons set forth herein the Plaintiff's motion for reconsideration is DENIED and the Defendants' motion for prefiling order is GRANTED.

Background

The Plaintiff purchased a hand-held gas-powered torch from Home Depot produced by the Defendants. The Plaintiff alleged that he sustained injuries on April 21, 2006, due to a torch malfunction. On October 10, 2006, the Plaintiff filed a diversity products liability case under California law

against the Defendants in the Alameda County Superior Court. The action was removed to the Northern District of California and transferred to the Southern District of California. The Honorable Michael M. Anello granted the Defendants' motion for summary judgment on July 28, 2009. The Ninth Circuit Court of Appeals affirmed the district court's decision and issued an opinion on May 17, 2010. *See Shalaby v. Newell Rubbermaid, Inc.*, 379 Fed. Appx. 620 (9th Cir. 2010). The Supreme Court denied the Plaintiff's Petition for Writ of Certiorari on November 1, 2010. (Doc. No. 5-3, at 104.)

The Plaintiff, an attorney licensed in the state of California, initiated the current action, pro se, on January 12, 2011. He filed the First Amended Complaint ("FAC") a day later on January 13, 2011. (Doc. No. 3) The Plaintiff alleged five causes of action against the Defendants: 1) Declaratory Relief; 2) Fraud; 3) Intentional Tort; 4) Negligence; and 5) Injunctive Relief. On February 4, 2011, Defendants filed a motion to dismiss, (Doc. No. 5), for failure to state a claim which was subsequently granted on September 9, 2011. (Doc. No. 23.) At that time, all of the Plaintiff's claims were dismissed with prejudice, except for the Plaintiff's general theory of fraud and request for injunctive relief, which were dismissed without prejudice. The Plaintiff filed a Second Amended Complaint ("SAC"), (Doc. No. 34), on October 8, 2011, which again alleges a claim under a general theory of fraud and seeks injunctive relief. The Plaintiff also asserted a cause of action for fraud and unfair business practices. The Defendants filed a motion to dismiss the SAC, (Doc. No. 36), on October 19, 2011, which was granted with prejudice on March 9, 2012. (Doc. No. 48.)

On May 5, 2012, the Plaintiff filed this motion for reconsideration. (Doc. No. 57) The Plaintiff claims that he has discovered new evidence that was withheld by the Defendants. (*Id.* at 3.) The Plaintiff claims that the Defendants withheld a report entitled "Analysis of Failed MAPP Gas Cylinder" prepared by R.A. Hoffman Engineering, P.C. ("Hoffman Report"). (*Id.* at 3.) The Plaintiff argues that this report could not have been obtained sooner and therefore the Court should grant his request for reconsideration. (*Id.* at 3-4.) On May 4, 2012, the Defendants filed an opposition arguing that they were not required to produce the Hoffman Report and in any event the report is irrelevant. (Doc. No. 61, at 5-7.) Additionally, the Defendants include a request for a prefiling order. (*Id.* at 8.) The Plaintiff filed a reply on May, 9, 2012. (Doc. No. 62.)

Legal Standard

"Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations and internal quotation marks omitted). As the Ninth Circuit has explained, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id.* (citations and internal quotation marks omitted). "Whether or not to grant reconsideration is committed to the sound discretion of the court." *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003) (citation omitted).

Discussion

The Plaintiff argues that the Hoffman Report was never disclosed by the Defendants and that this failure to disclose warrants the granting of the Plaintiff's motion for reconsideration. (Doc. No. 57, at 3.) The Defendants argue that the Hoffman Report is irrelevant on several grounds and fails to support the Plaintiffs' request for reconsideration. (Doc. No. 61, at 5-7.)

I. Motion for Reconsideration

The sole basis of the Plaintiff's motion for reconsideration is that Bernzomatic allegedly improperly withheld the Hoffman Report in the prior action. (Doc. No. 57, at 3.) In support of this allegation, the Plaintiff simply states: "Extensive discovery was exchanged between the parties. Defendants provided many reports and documents pertaining to other injuries and cases. However, they withheld one." (*Id.*) The Plaintiff does not provide any facts indicating that the Defendant should have produced the report. No discovery request or response is cited, no deposition questions are referred to, no order of the Court is noted. There is simply no basis for this Court to find that the Defendant improperly withheld anything.

Additionally, the Court dismissed the Plaintiff's claims on several independent bases that would have remained sound even if the Plaintiff had been in possession of the Hoffman Report prior to the initiation of this action. The SAC was dismissed because: (1) the Plaintiff's claims are barred by res judicata, (Doc. No. 48, at 7-9.); (2) the Plaintiff was unable to allege reasonable reliance and resulting

damage (*Id.* at 12.); (3) the Plaintiff does not have standing to assert a UCL claim (*Id.* at 13-15.); and (4) the Plaintiff's claims are barred by the statute of limitations, (*Id.* at 15-16).

Furthermore, upon review of the Hoffman Report, the Court finds that it is irrelevant because it relates to a purported metallurgical analysis of a single cylinder that was not involved in the Plaintiff's incident. The cylinder examined by Dr. Hoffman was manufactured by Western Industries. (Doc. No. 57-2, at 4.) The Plaintiff claims that the cylinder involved in his accident was manufactured by Worthington, not Western Industries, but that Worthington purchased the MAPP gas manufacturing facility from Western Industries, Inc. in September 2004, and went on to manufacture in that facility "24 million MAPP gas cylinders" up to that time. (Doc. No. 62, at 4.) Despite the Plaintiff's arguments to the contrary, the Court finds this report to be irrelevant for the reasons stated above.

II. Defendant's Request for Prefiling Order

Defendant Bernzomatic renews it's request that this Court issue a prefiling order requiring the Plaintiff to post a $25,000 bond, or "approximately double the outstanding cost awards to date to secure future costs before filing any claims." (Doc. No. 61, at 9.) In addition, the Defendant requests that the order apply to Plaintiff's wife, Sonia Dunn-Ruiz and any other person acting on their behalf. (*Id.*) The prefiling order requested by Defendant would require the Plaintiff obtain leave of the court "prior to filing any new actions against any defendant, in any forum, related in any way to the injuries he sustained on April 21, 2006." (*Id.* at 9.) In the prior action Bernzomatic was awarded costs in the amount of $11,383.21, which remain unpaid by the Plaintiff in violation of this Court's order. (Doc. No. 6-3, at 18-19.) Bernzomatic was also awarded costs by the Ninth Circuit in the amount of $31.20 which remain unpaid by the Plaintiff in violation of the Ninth Circuit's order. (*Id.* at 20-22.) As a result, Bernzomatic requests that the prefiling order include the requirement that the Plaintiff "verify and document payment in full of the costs awarded to Bernzomatic from this Court and the Ninth Circuit." (Doc. No. 61, at 9.)

The All Writs Act, 28 U.S.C. § 1651(a), gives district courts power to enjoin litigants with abusive and lengthy histories from filing further litigation without first obtaining leave of the court. *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). "Flagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used

to consider the meritorious claims of other litigants." *Id.* at 1148. Nevertheless, a prefiling order is considered an extreme remedy and as such, should rarely be granted. *Id.* at 1147. "Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (citations omitted). Thus, "orders restricting a person's access to the courts must be based on adequate justification supported in the record and narrowly tailored to address the abuse perceived." *De Long*, 912 F.2d at 1149. A district court must consider four factors before entering a prefiling order. "First, the litigant must be given notice and a chance to be heard before the order is entered." *Molski*, 500 F.3d at 1057. Next, "the district court must compile an adequate record for review." *Id.* (internal quotation marks omitted). "Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation." *Id.* Lastly, "the vexatious litigant order must be narrowly tailored to closely fit the specific vice encountered." *Id.* (internal quotation marks omitted).

A. First Factor

The first factor requires that the litigant be given notice and a chance to be heard before the order is entered. *Id.* In this case, the Plaintiff had fair notice of the possibility that he might have a pre-filing order entered against him because the Defendants' motion for pre-filing was served on the Plaintiff. (Doc. No. 61, at 36.) The Plaintiff also had the opportunity and did address the renewed pre-filing motion in his reply. *See* Doc. No. 62. *Cf. Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) (holding, in a case involving sanctions levied against an attorney, that an opportunity to be heard does not require an oral or evidentiary hearing on the issue, but instead that the opportunity to brief the issue fully satisfies due process requirements).

B. Second Factor

The second factor requires the district court create an adequate record for review. *Molski*, 500 F.3d at 1059. "An adequate record for review should include a listing of all cases and motion that led the district court to conclude that a vexatious litigant order was needed." *Id.*

The Plaintiff's claims against Bernzomatic, in which he seeks damages for personal injuries he sustained as a result of an accident that occurred on April 21, 2006, have now been actively litigated for six years. The Plaintiff's original complaint (Case No. 07-cv-2107, Doc. No. 1.) was filed in 2007, with

summary judgment being entered against the Plaintiff and in favor of Bernzomatic on July 28, 2009. (Case No. 07-cv-2107, Doc. No. 209.) The basis of the Court's grant of summary judgment was that the Plaintiff did not produce evidence to support his claim that an alleged defect in the subject hand-held torch or the MAPP gas cylinder to which it was attached caused the Plaintiff's accident. (*Id.* at 24.) The Plaintiff appealed this summary judgment ruling to the Ninth Circuit, which affirmed this Court's ruling on May 17, 2010. (Doc. No. 5-3 at 51-55.) The Supreme Court denied review on November 1, 2010. (*Id.* at 104.)

In 2010, the Plaintiff attempted to relitigate his claims against Bernzomatic in the Contra Costa Superior Court. (*Id.* at 79.) On December 2, 2010 the state court dismissed the Plaintiff's claims. (*Id.* at 81.) The Plaintiff returned to this Court in 2011, in another effort to relitigate his claims. (Doc. No. 1) This Court dismissed the Plaintiff's FAC, (Doc. No. 3), on September 9, 2011, (Doc. No. 23), and his SAC, (Doc. No. 34), on March 9, 2012 (Doc. No. 48.) The Plaintiff has filed sixteen motions in an effort to relitigate these claims, including, ex parte applications, motions for reconsideration, petitions for rehearing, motions for recusal, and motions to appeal chambers orders.

This is the fourth time that the Plaintiff has attempted to introduce "newly discovered evidence" in an effort to relitigate his claims. The first attempt was in 2009 when the Plaintiff filed a motion to reopen discovery in the prior litigation. (Case No. 7-cv-2107, Doc. No. 93.) This motion was based upon his declaration that a year after his deposition was taken, he examined photographs from the time of his injury and underwent hypnosis which convinced him that the accident had occurred in a manner inconsistent with his prior testimony. (Case No. 7-cv-2107, Doc. No. 93-4, at 6.) The Court denied the Plaintiff's 2009 "newly discovered evidence" motion. (Case No. 7-cv-2107, Doc. No. 131.) In 2011, the Plaintiff filed a FAC in this action alleging that on May 19, 2010, he was contacted by a former Bernzomatic employee who claimed that Bernzomatic made misrepresentations during discovery and that such information was a basis to set aside the prior judgment. (Doc. No. 3, at 7). After the Court dismissed the Plaintiff's FAC, the Plaintiff filed a SAC alleging that he was once again contacted by a former Bernzomatic employee, this time on October 8, 2011, who told him that the hand-held torches do not contain fracture grooves. (Doc. No. 34, at 11-12.) The Court dismissed the Plaintiff's third newly discovered evidence claim. (Doc. No. 48.) The instant motion for reconsideration marks the Plaintiff's

fourth attempt to introduce "newly discovered evidence," this time from an unidentified source that he will only reveal *in camera*. (Doc. No. 57, at 4.)

When the Court dismissed the Plaintiff's third newly discovered evidence claim it also denied Bernzomatic's motion for prefiling order. (Doc. No. 23) The Court explained that it had considered the four factors required to issue a prefiling order, and found that the Defendant's motion had merit, but given the disfavored nature of such an order the Court declined to issue it at that time. (*Id.* at 14.) The Court acknowledged the Plaintiff's lengthy history of filing meritless motions and attempting to relitigate issues. (*Id.* at 14.) Additionally, the Court acknowledged that the Plaintiff was previously warned by the Court that sanctions would be imposed if he continued his attempts. (*Id.* at 14.) Additionally, the Court warned the Plaintiff that any failure to comply with the order or any attempt to relitigate the claims dismissed with prejudice would result in sanctions. (*Id.* at 14-15.) Since that order, the Plaintiff has filed a motion to extend his time to amend, (Doc. No. 24), a request for judicial notice regarding a recall, (Doc. No. 41), an ex parte motion for leave to file a supplemental complaint, (Doc. No. 43), a request for judicial notice of a complaint filed in Louisiana, (Doc. No. 45), a notice of appeal, (Doc. No. 53), and the instant motion for reconsideration, (Doc. No. 57). It is clear that the Plaintiff has not heeded the Court's warning, and continues to file frivolous motions to relitigate his claims.

C. Third Factor

The third factor requires the district court to make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. *Molski*, 500 F.3d at 1059. "To decide whether the litigant's actions are frivolous or harassing, the district court must look at both the number and content of the filings as indicia of the frivolousness of the litigant's claims." *Id.* (citations and internal quotations marks omitted). The Court finds that the motions discussed above are a frivolous, rehashing of arguments already considered and rejected by the Court.

D. Fourth Factor

The fourth and final factor requires "that the pre-filing order must be narrowly tailored to the vexatious litigant's wrongful behavior." *Id.* at 1061. Defendants request the Court issue a prefiling order that requires the Plaintiff obtain leave of the court "prior to filing any new actions against any defendant, in any forum, related in any way to the injuries he sustained on April 21, 2006." (Doc. No.

61, at 9.) The Defendants also request that the Court require the Plaintiff to "verify and document payment in full of the costs awarded to Bernzomatic from this Court and the Ninth Circuit." (*Id.*) The Court finds Defendants' requests to be narrowly tailored to the Plaintiff's wrongful behavior. The requested prefiling order only prevents the Plaintiff from filing any new actions regarding the injuries related to the accident on April 21, 2006. The order thus covers only the type of claims that the Plaintiff had been filing vexatiously and is narrowly tailored because it merely subjects the Plaintiff's complaints to an initial screening review by the Court. As such, it will not deny the Plaintiff access to courts on any claim that is not frivolous.

Accordingly, the Court finds that all four prefiling factors have been met and a prefiling order against the Plaintiff is warranted. Andrew Shalaby must seek and obtain leave of this Court, prior to filing any new actions, against any defendant, in any forum, based upon, or related in any way, to injuries he sustained as a result of the accident on April 21, 2006. The filing for such leave must contain verification and documentation that Andrew Shalaby has paid in full all cost awards against him and in favor of Bernzomatic. If such leave is deemed appropriate by this Court, Andrew Shalaby must post a bond to secure future costs in an amount to be determined at the time of any application for leave. This prefiling order extends to the Plaintiff, his wife Sonia Dunn-Ruiz and any other person or agent acting on their behalf.

Conclusion

For the reasons stated above, the Court **DENIES** the Plaintiff's motion for reconsideration and **GRANTS** the Defendants' motion for prefiling order.

IT IS SO ORDERED.

DATED: July 27, 2012

Hon. Anthony J. Battaglia
U.S. District Judge

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECLARATION OF DAVID THOMAS

In Re Subpoena and Deposition Notice to DAVID THOMAS

Civil Action No.: _____

(Underlying Action Pending in the United States District Court for the District of Arizona, Civil Action No.: 2:17-cv-03195-JJT)
and
(Underlying Action Pending in the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ

David Thomas., declares as follows:

1. I am an adult resident of the State of New York residing at 1004 East River Road, Grand Island, New York.

2. I am currently semi-retired. From 1990 to 2005, I worked at Bernzomatic in Medina, New York (owned by Irwin Industrial Tool Company, a subsidiary of Newell Rubbermaid). All of the positions I held involved Manufacturing Engineering and Operations.

3. I was never involved in the design, testing or evaluation of the torches and cylinders. Specifically, I was never involved in the design, testing or evaluation of the fracture groove.

4. The Bernzomatic employee who would be knowledgeable about the design, testing and evaluation of the torches, fracture groove and cylinders is the Senior Engineering Manager, Michael Ridley.

5. On November 13 or 14, 2018, I was served at my home with the attached documents requiring my appearance at Alliance Court Reporting at 120 East Avenue in Rochester, New York on December 20, 2018. A complete, true and accurate copy of the subpoenas served is annexed as Exhibit A.

6. It took me quite some time to find someone who could provide me with direction and assistance in opposing the subpoenas.

7. The subpoenas seem to be asking for testimony and things that I know nothing about. I have never met Mr. Peralta or Mr. Bailey and have no information regarding their lawsuits. I have been informed by my counsel that the products Mr. Peralta and Mr. Bailey were using at the time of their accidents were not manufactured by Bernzomatic but were manufactured by Worthington.

8. I do not have any documents responsive to the subpoenas.

9. I have never been an employee of Worthington and I have never worked at Worthington's Wisconsin manufacturing facility.

10. Mr. Shalaby, the attorney for Mr. Bailey and Mr. Peralta, has attempted to contact me on numerous occasions to the point of harassment.

11. Being forced to travel from my home near Buffalo, New York to Rochester, New York only days before Christmas is unfair and places an undue burden on my family and me.

12. On December 3, 2018, I received a letter from counsel for Mr. Bailey and Mr. Peralta via regular U.S. mail stating, "You are scheduled to testify…on December 20, 2018 at 10 a.m.…. We would like to know if you would be willing to travel to Manhattan, NY for your deposition…." Manhattan is more than 400 miles from where I reside!

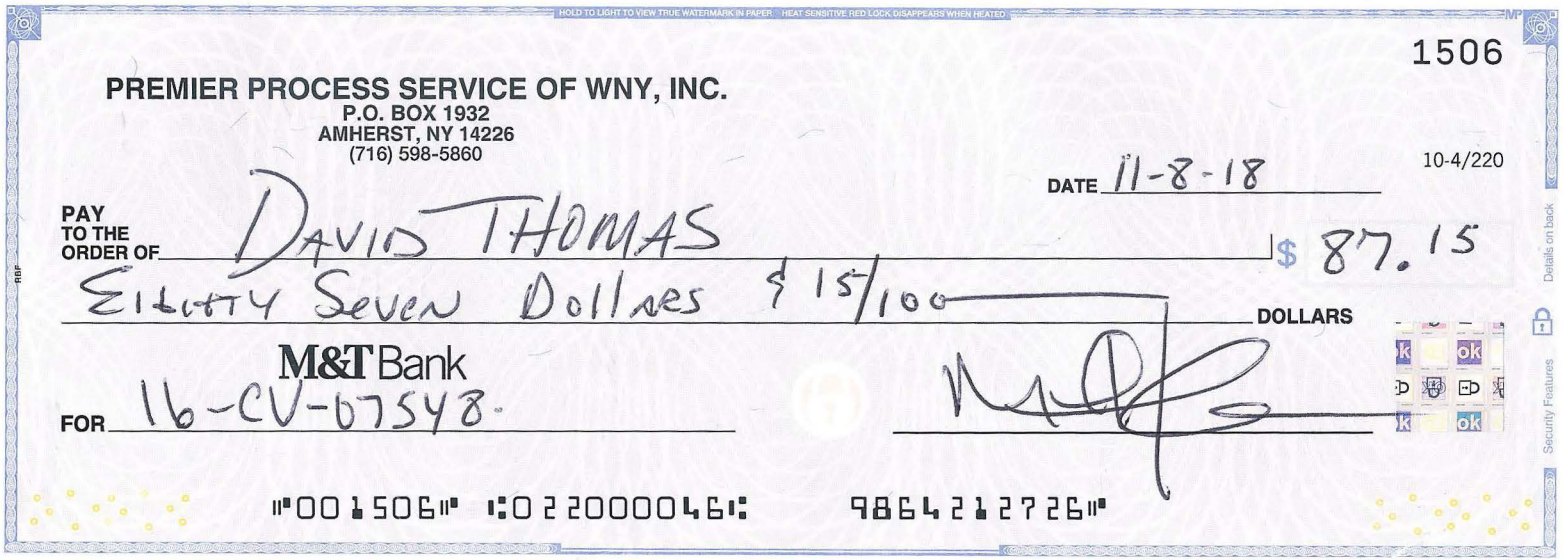
I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 3, 2018

David Thomas 12-4-18

0108292.0656548 4838-0679-7441v2

EXHIBIT A



HOLD TO LIGHT TO VIEW TRUE WATERMARK IN PAPER. HEAT-SENSITIVE RED LOCK DISAPPEARS WHEN HEATED.

1506

PREMIER PROCESS SERVICE OF WNY, INC.
P.O. BOX 1932
AMHERST, NY 14226
(716) 598-5860

10-4/220

DATE 11-8-18

PAY TO THE ORDER OF DAVID THOMAS $ 87.15

Eighty Seven Dollars $ 15/100 DOLLARS

M&T Bank

FOR 16-CV-07548.

⑈001506⑈ ⑆022000046⑆ 9864212726⑈

Details on back. Security Features.

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

Kurtis M. Bailey
Plaintiff
v.
Worthington Industries Incorporated, et al.
Defendant

Civil Action No. 16-cv-07548 PRG-IDJ

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: DAVID THOMAS

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Problems and defects with Bernzomatic/Worthington/Western/Chilton NRT fuel cylinders and torches, including failures, defects, injuries, damage, and matters pertaining to the design of the torch fracture groove.

Place:	Date and Time:
Alliance Court Reporting, Inc. 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920)	12/20/2018 10:00 am

The deposition will be recorded by this method: stenographically by court reporter, and by video.

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/07/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Kurtis M. Bailey, who issues or requests this subpoena, are:

Andrew W. Shalaby, 7525 Leviston Avenue, El Cerrito, CA 94530 Tel. 510-551-8500

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 16-cv-07548 PRG-IDJ

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named individual as follows: Mr. John M. Nelson

355 UPPER VALLEY ROAD, ROCHESTER, NY 14624

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

David Wei Chen sbn 184071
1300 Clay Street, Suite 600
Oakland, CA 94612-1427
Tel. 510-575-0851
Fax: 510-201-1577
Cell: 510-640-7251
email: david.chen@davidwchenlaw.com

Andrew W. Shalaby sbn 206841
7525 Leviston Ave
El Cerrito, CA 94530
Tel. 510-551-8500
Fax: 510-725-4950
email: andrew@eastbaylaw.com

Attorneys for Plaintiff
Kurtis M. Bailey

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Kurtis M. Bailey, Plaintiff, vs. Worthington Cylinder Corporation, et al., Defendants.	Case No. 16-cv-07548 PRG-IDJ INSTRUCTIONS TO MR. DAVID THOMAS FOR APPEARANCE AND PRODUCTION OF DOCUMENTS AT DEPOSITION Deposition date: 12/20/18 Time: 10:00 a.m. Location: Alliance Court Reporting 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920) Hon. Philip G. Reinhard

TO MR. DAVID THOMAS:

You have been served with a subpoena to testify at a deposition in a civil action. You are respectfully requested to bring with you the following:

> Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

Please find enclosed herewith a check for witness fees and mileage in the amount of $87.15.

Upon receipt of the subpoena please call Plaintiff's counsel's office, East Bay Law, at 510-551-8500, and advise as to the estimated number of documents and nature of products and/or materials you may bring to the deposition so that arrangements can be made to facilitate copying and photography.

Dated: November 7, 2018

Andrew W. Shalaby,
Attorney for Plaintiff Kurtis M. Bailey

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Arizona

Jason Lou Peralta
Plaintiff
v.
Worthington Industries Incorporated, et al.
Defendant

Civil Action No. 2:17-cv-03195-JJT

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: DAVID THOMAS

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Problems and defects with Bernzomatic/Worthington/Western/Chilton NRT fuel cylinders and torches, including failures, defects, injuries, damage, and matters pertaining to the design of the torch fracture groove.

Place:	Date and Time:
Alliance Court Reporting, Inc. 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920)	12/20/2018 10:00 am

The deposition will be recorded by this method: stenographically by court reporter, and by video.

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/05/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Jason Lou Peralta, who issues or requests this subpoena, are:

David W. Chen, 1300 Clay Street, Suite 600, Oakland, CA 94612 Tel. 510-551-8500, 510-575-0851

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:17-cv-03195-JJT

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named individual as follows: Mr. John M. Nelson

355 UPPER VALLEY ROAD, ROCHESTER, NY 14624

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

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(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

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(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

Andrew W. Shalaby sbn 206841
7525 Leviston Ave
El Cerrito, CA 94530
Tel. 510-551-8500
Fax: 510-725-4950
email: andrew@eastbaylaw.com

David Wei Chen sbn 184071
1300 Clay Street, Suite 600
Oakland, CA 94612-1427
Tel. 510-575-0851
Fax: 510-201-1577
Cell: 510-640-7251
email: david.chen@davidwchenlaw.com

Attorneys for Plaintiff
Jason Lou Peralta

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jason Lou Peralta, Plaintiff, vs. Worthington Industries, Inc.; Worthington Cylinder Corporation; Worthington Cylinder Wisconsin, LLC; BernzOmatic Company; Defendants.	Case Number: 2:17-cv-03195-JJT INSTRUCTIONS TO MR.DAVID THOMAS FOR APPEARANCE AND PRODUCTION OF DOCUMENTS AT DEPOSITION Deposition date: 12/20/18 Time: 10:00 a.m. Location: Alliance Court Reporting 120 East Avenue, Suite 200 Rochester, NY 14604 (tel. 585-546-4920) Judge: Hon. John J. Tuchi

TO MR. DAVID THOMAS:

You have been served with a subpoena to testify at a deposition in a civil action. You are respectfully requested to bring with you the following:

> Any documents, photos, and other materials pertaining to the Non-refillable tall ("NRT") fuel cylinders, containing all types of flamable fuels, AND TORCHES with the fracture groove features, produced by Bernzomatic, Irwin Industrial Tool, and/or any of their subsidiaries, manufacturers, or distributors. In particular, documents pertaining to problems and defects, including Roger Maxson and other reports.

Please find enclosed herewith a check for witness fees and mileage in the amount of $87.15.

Upon receipt of the subpoena please call Plaintiff's counsel's office, East Bay Law, at 510-551-8500, and advise as to the estimated number of documents and nature of products and/or materials you may bring to the deposition so that arrangements can be made to facilitate copying and photography.

Dated: November 7, 2018

David W. Chen, Attorney for Plaintiff
Jason Lou Peralta

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH

In Re Subpoena and Deposition Notice to DAVID THOMAS

Civil Action No.: _____

(Underlying Action Pending in the United States District Court for the District of Arizona, Civil Action No.: 2:17-cv-03195-JJT)
and
(Underlying Action Pending in the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ

Now comes David Thomas ("Mr. Thomas"), by and through counsel, and respectfully requests an Order to quash the non-party subpoenas served on him by Plaintiffs Kurtis M. Bailey and Jason Lou Peralta in the two underlying actions referenced in the above caption (collectively the "Underlying Actions"). Pursuant to Federal Rules of Civil Procedure 26 and 45, the subpoenas seek information that is not relevant to the litigation, is cumulative and duplicative of discovery previously taken, exceeds existing discovery limitations issued by the courts in the Underlying Actions, subjects Mr. Thomas to an undue burden, and is a continuation of a decade-long meritless campaign by Plaintiff's counsel against Mr. Thomas's former employer.

PRELIMINARY STATEMENT

The subpoenas at issue were issued in two separate matters. One pending in the U.S. District Court for the Northern District of Illinois *(Bailey v. Worthington Industries Inc., et al)* wherein all discovery has been stayed, and the second, in the U.S. District Court for the District of Arizona *(Peralta v. Worthington Industries Inc., et al).* Mr. Thomas and his former employer

are not parties to the cases pending in Illinois and Arizona therefore, seeking relief from those courts is not readily available. The subpoenas require compliance in Rochester, New York. As such, even though the actions for which the subpoenas were issued are pending elsewhere, an application to quash is properly returnable in this District. Fed. R. Civ. P. 45 (d)(3).

ARGUMENT

A. The Subpoenas Seek Information that is Not Relevant to the Litigation

A subpoena issued to a non-party pursuant to Rule 45 is subject to Rule 26(b)(1)'s relevance requirement. *Albino v. Global Entertainment USA, Ltd.*, No. 6:14-cv-06519 (MAT), 2017 WL 3130380, *1 (W.D.N.Y. July 24, 2017). The subpoena "must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." *Id.* In this case, Plaintiffs allege injuries sustained on May 20, 2014 by Mr. Bailey and February 5, 2016 by Mr. Peralta caused by products manufactured by Defendant Worthington Industries, Inc. ("Worthington"). *See Declaration of Attorney William Bauer* ¶3. Mr. Thomas has no personal knowledge about the products involved in this case or any of the facts in the Underlying Actions.

From 1990 until 2005, Mr. Thomas worked for the Bernzomatic division of Irwin Industrial Tool Company, a former subsidiary of Newell Brands, Inc. (fka Newell Rubbermaid) which was located in Medina, New York ("Newell/Bernzomatic"). Newell/Bernzomatic manufactured CGA 600-compliant fuel torches and was a distributor for non-refillable tall (NRT) gas cylinders which were compatible with Newell/Bernzomatic torches. Mr. Thomas's positions involved the engineering of the machines used in the manufacturing process; not the end product itself – torches and cylinders. Mr. Thomas was not involved in the design and testing of the torches, fracture groove and/or cylinders. When Mr. Thomas left

Newell/Bernzomatic's employment in 2005, he did not take (nor does he currently possess) any responsive documents from his former employer. *See ¶¶2-3, 8 of the Declaration of David Thomas (attached as Exhibit F to the Declaration of Attorney William Bauer).*

On July 1, 2011, Newell sold all assets of the Bernzomatic division to Worthington and ceased doing business in the torch and cylinder industry at that time. First Amended Complaint at ¶¶ 12, 19-20, *Peralta v. Worthington Inds. Inc. et. al.*, No. 2:17-cv-03195-JJT (D. Ariz. Dec. 18, 2017). The torches involved in these cases were manufactured by Worthington in 2013 and 2015. The propane cylinders involved in these cases were manufactured by Worthington in 2013 and 2014. Both products were manufactured at Worthington's manufacturing facility in Wisconsin. *See Declaration of Attorney William Bauer* ¶3.

The products at issue were manufactured close to a decade after Mr. Thomas left Newell/Bernzomatic's employment, by a company for which Mr. Thomas was never an employee, and at a Wisconsin manufacturing facility where Mr. Thomas was never employed. In short, Mr. Thomas knows nothing about the products at issue in this case. Additionally, Mr. Thomas has never met Plaintiff Bailey or Peralta and knows nothing about the alleged incident in Illinois in 2014 or the alleged incident in Arizona in 2016. *See ¶¶7, 9 of the Declaration of David Thomas (attached as Exhibit F to the Declaration of Attorney William Bauer).*

Due to the significant passage of time, lack of knowledge regarding the products at issue and lack of knowledge about the alleged incident, Plaintiffs fail to meet their burden of demonstrating that the information sought from Mr. Thomas is relevant and material to the allegations and claims at issue. *Albino* at *1. Therefore, the subpoena must be quashed.

B. The Subpoenas Exceed Existing Limitations on Discovery in the Underlying Actions

On November 20, 2018, the Bailey court issued a minute order reminding the parties "that a [discovery] stay remains in place." *See Declaration of Attorney William Bauer* ¶5 *Exhibit C Minute Entry by the Honorable Iain D. Johnston, N.D. IL.*. The subpoena served on Mr. Thomas is in direct violation of the stay issued by Judge Johnston of the Northern District of Illinois.

The subpoenas seek information concerning, "fuel cylinders, **containing all types of flammable fuels**," thereby exceeding the permissible scope of discovery in the Underlying Actions which limit discovery to NRT propane cylinders only. Defendant Worthington filed objections to the Thomas subpoenas in both cases reserving its right to seek sanctions stating:

1. Despite the court's order prohibiting discovery on cylinders other than "NRT" propane cylinders, Plaintiff's notice indicates that the matters covered in the deposition will include issues with "NRT" fuel cylinders without any limitation to propane NRT cylinders. Plaintiff has previously sought discovery on MAPP gas cylinders and [the] court has disallowed such discovery.
2. Despite the court's order prohibiting discovery on cylinders other than "NRT" propane cylinders, Plaintiff's document request seeks documents "pertaining to the Non-Refillable tall ("NRT") cylinders containing all types of flammable fuels…" Plaintiff has previously sought discovery on MAPP gas cylinders and [the] court has disallowed such discovery.

See Declaration of Attorney William Bauer at ¶4 and Exhibit B: Worthington's Objections.

Plaintiff cannot be permitted to make an end run around limitations placed on discovery in the courts where the actions are pending by coming to New York. Since the information

sought in these subpoenas has already been deemed irrelevant by the courts where the cases are pending, the subpoena must be quashed. *See Albino*, at *1.

C. Information Sought by the Subpoenas is Duplicative and Cumulative of Discovery Already Taken in the Underlying Actions.

A non-party seeking a court's protection from discovery may invoke "the overlapping and interrelated provisions of both Rules 26 and 45." *Mannington Mills, Inc. v. Armstrong World Indus., Inc.* 206 F.R.D. 525, 529 (D. Del. 2002). Fed. R. Civ. P. 26 (b)(2)(C) allows the Court to limit discovery if it determines that: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Notably, **"[r]estrictions on discovery may be broader where a non-party is the target of discovery to protect such third parties from unnecessary harassment, inconvenience, expense or disclosure of confidential information."** *(emphasis added) In re Candor Diamond Corp.*, 26 B.R. 847, 849 (Bankr. S.D.N.Y. 1983); *see also Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 52 (S.D.N.Y. 1996); *In re Biovail Corp. Sec. Litig.*, 247 F.R.D. 72, 74 (S.D.N.Y. 2007).

Even if the requesting party seeks relevant information, "discovery is not allowed where no need is shown, or where compliance is unduly burdensome, or where the potential harm caused by production outweighs the benefit." *Mannington Mills*, 206 F.R.D. at 529 (*citing Micro Motion*, 894 F.2d at 1323); *Gonzalez v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal.,

2006) ("[A] court may modify or quash a subpoena even for relevant information if it finds that there is an undue burden on the non-party. Undue burden to the non-party is evaluated under both Rule 26 and Rule 45."); *see also Concord Boat Co. v. Brunswick*, 169 F.R.D. at 53 (granting the non-party witness' motion to quash based on facial overbreadth of subpoena).

Neither Mr. Thomas, nor his former employer, are parties to the Underlying Actions. The parties in the Underlying Actions, including Plaintiffs, had the opportunity to depose the former Senior Engineering Manager for the Bernzomatic division of Newell, Michael Ridley, for an entire day on January 26, 2018. [1] Mr. Ridley who was employed by Newell/Bernzomatic through the 2011 asset sale to Worthington, is the most knowledgeable person regarding certain information requested in the Thomas subpoenas, "matters pertaining to the design of the torch fracture groove," and "Torches with the fracture groove features produced by Bernzomatic, Irwin Industrial Tool..." *See ¶4 of the Declaration of David Thomas (attached as Exhibit F to the Declaration of Attorney William Bauer).* Assuming arguendo, that any of the information sought by the Thomas subpoenas is relevant, the parties in the Underlying Actions have already had full and ample opportunity to depose the most knowledgeable representative from Newell/Bernzomatic. Id.; *Declaration of Attorney William Bauer ¶6 and Exhibit D: Excerpt of Deposition Transcript of Michael Ridley.*

Accordingly, the Thomas subpoenas are cumulative and duplicative of discovery already taken in the Underlying Actions. The information sought from Thomas has already been

[1] *At p. 6:* MS. SCHNEIDER NAYLOR: As counsel for the deponent Michael Ridley, I'd like to put a statement on the record that neither the deponent, Michael Ridley, nor his employer Newell, are parties in either the Bailey or the Peralta lawsuits in which this deposition is being taken. Mr. Ridley has agreed to appear at the request of Defendant Worthington to provide third-party fact testimony regarding the fracture groove [sic]. *Declaration of Attorney William Bauer ¶6 and Exhibit D: Excerpt of Deposition Transcript of Michael Ridley dated January 26, 2018 in the Underlying Actions.*

obtained from Mr. Ridley. The benefit, if any, of forcing Mr. Thomas to travel to Rochester to be asked questions about things he has no knowledge of, is clearly outweighed by the burden and expense imposed on Mr. Thomas. *See* Fed. R. Civ. P. 26 (b)(2)(C).

D. Rule 45 Mandates that the Subpoena Be Quashed because it Poses an Undue Burden on Mr. Thomas

Fed. R. Civ. P. 45(d)(3)(iv) states that, "on timely motion, the court for the district where compliance is required **must** quash or modify a subpoena that...subjects a person to undue burden." (emphasis added). Parties may not obtain discovery that is disproportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). This Court determined that when considering a motion to quash, the value of the information to the serving party must be weighed against the burden of the subpoenaed party. *See Moll v. Telesector Resources Group, Inc.,* No. 04-CV-0805S(Sr), 2017 WL 2241967, *2 (W.D.N.Y. May 23, 2017).

Rule 45 mandates the quashing of a subpoena which subjects the deponent to an undue burden. Mr. Thomas, who is currently semi-retired, resides at 1004 East River Road, Grand Island, NY 14072 (near Buffalo),[2] approximately eighty miles from Alliance Court Reporting in Rochester NY, the location of the deposition. The deposition is scheduled for December 20, a few days before Christmas when all upstate New Yorkers know to expect snow and treacherous roads. The driving time each way is at least two hours on a clear day and more than double that with lake effect snow. *See ¶1, 2, 5, 11 of the Declaration of David Thomas (attached as Exhibit F to the Declaration of Attorney William Bauer).*

As if the current inconvenience is not enough, on December 3, 2018, Mr. Thomas received a letter via regular U.S. Mail from Plaintiffs' counsel in the Underlying Actions

[2] The subpoenas served on Thomas are facially defective because they reference a "Mr. John M. Nelson, 355 UPPER VALLEY ROAD, ROCHESTER NY 14624." Thomas lives in Grand Island NY, not Rochester. *See Subpoena attached as Exhibit A.* A simple internet search for "David Thomas" in upstate New York produces 426 records.

requesting that he appear for the December 20, 2018 deposition in Manhattan, instead of Rochester! *See ¶ 12 of the Declaration of David Thomas (attached as Exhibit F to the Declaration of Attorney William Bauer).*

In weighing the value, if any, of the information sought with the burden placed on Mr. Thomas, the imbalance is clear. *Moll*, at *2. Therefore, respectfully, this court must quash the subpoena.

E. Plaintiff's Counsel Continues His Meritless Campaign Against Mr. Thomas's Former Employer

On July 27, 2012, the U.S. District Court for the Southern District of California deemed it necessary and appropriate to declare Plaintiffs' counsel, Mr. Shalaby, a vexatious litigant in his personal claim against Newell/Bernzomatic and several of the defendants/interested parties arising from injuries he sustained in 2006 while allegedly using a torch and cylinder. *Shalaby v. Bernzomatic et al.*, No. 11cv68 AJB (POR) (S.D. Ca. July 27, 2012). *See Declaration of Attorney William Bauer ¶7 and Exhibit E.* The Prefiling Order ("2012 Order") entered against Mr. Shalaby was affirmed by the Ninth Circuit Court of Appeals and remains in effect today, despite numerous attempts by Mr. Shalaby to have the Pre-filing Order terminated. *Shalaby v. Bernzomatic*, 584 Fed. Appx. 419, 420 (9th Cir. 2014). The most recent Order dated August 8, 2018 reaffirms the ongoing need for the 2012 Order. *See Declaration of Attorney William Bauer ¶7 and Exhibit E:* Order Denying Motion for Reconsideration and Grating Motion for Prefiling Order, *Shalaby v. Bernzomatic et al.*, No. 11cv68 AJB (POR) (S.D. Ca. July 27, 2012) and all subsequent Orders reaffirming dated Jan. 5, 2018, Feb. 28, 2018, and Aug. 8, 2018.

The impetus for the 2012 Order was over six years of aggressive, yet unsupported, claims by Mr. Shalaby against Newell/Bernzomatic and other interested parties, which involved Mr. Shalaby's numerous attempts to relitigate previously issued final decisions of the court in

multiple different federal and state courts. In entering the 2012 Order granting the extraordinary remedy, the *Shalaby* Court found that:

- Mr. Shalaby had fair notice that a prefiling order may be entered against him (p. 5);
- Mr. Shalaby had "not heeded the Court's warning, and continues to file frivolous motions to relitigate his claims" (p. 7);
- Mr. Shalaby's motions "are a frivolous [] rehashing of arguments already considered and rejected by the Court" (p. 7); and
- "Andrew Shalaby must seek and obtain leave of this Court, prior to filing any new actions, against any defendant, in any forum, based upon, or related in any way, to injuries he sustained as a result of the accident on April 21, 2006" (p. 8).

While Mr. Shalaby's involvement as counsel for Plaintiffs *Peralta* and *Bailey* is not a technical violation of the 2012 Order, it is a continuation of his decade-long frivolous and meritless campaign against the Newell/Bernzomatic, other defendants/interested parties and their products. The issuing of the subpoenas to Mr. Thomas and another former employee, John Nelson, who left Newell/Bernzomatic's employment in **1990** seeking irrelevant and/or duplicative and cumulative discovery, which exceeds the scope of permissible discovery in the Underlying Actions, and places a significant burden on Mr. Thomas, a semi-retired non-party is consistent with the behavior which elicited the issuance of the 2012 Order and its recent reaffirmance. Dragging an individual former employee into Mr. Shalaby's dispute with Newell/Bernzomatic should not be allowed.

CONCLUSION

Accordingly, pursuant to Fed. R. Civ. P. 26 and 45, Mr. Thomas respectfully request the Court to quash the subpoenas issued by the Plaintiffs in this matter.

DATED: December 5, 2018

WOODS OVIATT GILMAN LLP

By: _____

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PROPOSED ORDER

IN RE SUBPOENA AND DEPOSITION NOTICE TO DAVID THOMAS

Civil Action No.: _____

(Underlying Action Pending in the United States District Court for the District of Arizona, Civil Action No.: 2:17-cv-03195-JJT)

and

(Underlying Action Pending in the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ

David Thomas, having moved this Court for an Order pursuant to Fed. R. Civ. P. 45 (d) (3), quashing the subpoena served upon him in actions pending in the United States District Court for the District of Arizona, Civil Action No.: 2: 17-cv-03195-JJT and the United States District Court for the Northern District of Illinois, Civil Action No.: 16-cv-07548 PRG-IDJ, requiring compliance within this District; and sufficient cause appearing therefore, it is

ORDERED, that the subpoena served upon David Thomas is hereby quashed in its entirety.

SO ORDERED

_____
Hon.